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No. 22,543

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

HOLLY BRA OF CALIFORNIA, INC., Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*)[1] for enforcement of its order (R. 55-57)[2] against respondent issued May 26, 1967, and reported at 164 NLRB No. 151. This Court has jurisdiction, since the unfair labor practices occurred in Los

[1] The pertinent statutory provisions are reprinted in the Appendix A, *infra*, p. 17.

[2] References designated "R." are to Volume I of the Record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of the testimony as reproduced in Volume II of the record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Angeles, California, where respondent is engaged in the business of manufacturing and selling women's undergarments and swimwear. There is no issue concerning the Board's jurisdiction in the case.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by subjecting Dulce Fumero to discriminatory working conditions, thus forcing her to leave her employment, and by refusing to rehire her. The evidence upon which the Board's findings are based is summarized below.

A. Background

The Union[3] began an organizational campaign among respondent's employees in the latter part of January 1966,[4] and held a meeting of employees in the home of Dulce Fumero on February 10 (R. 24; Tr. 12). On February 21, the Union filed a petition with the Board seeking certification of an appropriate bargaining unit, which resulted in a consent election held on March 31 (R. 24). The result of the election was 43 ballots cast for the Union, 44 against it and four challenged ballots (R. 21). Thereafter, on April 5, the Union filed objections to the election results based on company misconduct, and subsequent to that filed additional charges of unfair labor practices against respondent (R. 22).

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[3] Los Angeles Dress & Sportswear Joint Board, a subordinate body of the International Ladies Garment Workers Union, AFL-CIO.

[4] Unless otherwise noted, all dates refer to 1966.

B. Respondent's pre-election misconduct

Within a week following the February union meeting, plant manager Mitsuo Yoshida questioned employee Fumero about her knowledge of the Union and what she expected of it (R. 25; Tr. 12). In reply to Fumero's explanation that the Union would provide employees with greater benefits, Yoshida told her the Union would not keep the promises it made and if she desired greater benefits she should seek employment elsewhere (R. 25; Tr. 13-14). On another occasion, Yoshida summoned her to his office and speaking through supervisor Genovena Sanchez as interpreter[5] accused her of being "the initiator of the [union] problem at the plant" and that he "wanted [her] not to be seeking out anyone or winning anyone with these problems" (R. 25; Tr. 15). He further suggested that "after everything would be over" the management "would try to better . . . wages," but did not "want that kind of problem" at the plant (R. 25; Tr. 16).

Immediately following the February union meeting, Yoshida also called employee Geraldine Wilson to his office and stated that a "rumor was going through the shop" that there had been "a meeting among the colored girls," and asked her if she knew anything about it (R. 26; Tr. 72). Wilson was also questioned by Company Secretary-Treasurer David Young who asked her how the employees "felt" about the union (R. 26; Tr. 75). On a similar occasion, Young told Wilson that if the Union won the election, the Company "would just as soon close down and forget it, because they couldn't meet union demands." Young also told Wilson that Cole and Olga[6] had no knowledge of the union organizational attempt and "there was a possibility they

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[5] Several of the Company's employees including Fumero were Spanish speaking, requiring the use of an interpreter during many plant discussions and also necessitating the use of one at the hearing.

[6] Respondent had contracts to produce swimsuits and beach robes for Cole Swimwear and brassieres and girdles for Olga Mfg. (R. 23; Tr. 193-194).

would withdraw their contract, because they were not union shops themselves" (R. 26; Tr. 73-74).

Juana Yanez was also called to Manager Yoshida's office in the pre-election period. Yoshida told her he wished to make sure that the employees understood what they were doing regarding unionization, and that "if the union enters the factory, Cole and Olga will terminate their contracts," in which event "many people" including Yanez' two cousins would lose employment (R. 26; Tr. 63).

In early March, after a meeting of all employees called by Young concerning the forthcoming election, Manager Yoshida approached employee Ahyda Medina at her work station and asked if the girls with whom she had stood at the meeting were for the Union and were they convincing her (R. 27; Tr. 111-112). Medina was also interrogated by Young on another occasion when he asked her about the union sympathies of her fellow employee, Cecelia Valencia (R. 27; Tr. 110).

On March 30, the day before the election, Yoshida and Young toured the plant and spoke to all the Company's employees in small groups. Yoshida, while speaking to three employees, including Wilson and Yanez, stated that "management was aware of those who had signed cards and sent them into the union," and had "ways of finding out things just like the union has." Yoshida then expressed the hope that they would make the "right decision" in the election (R. 26; Tr. 76).

On the morning of the election, Dulce Fumero was once more summoned to Yoshida's office where she was instructed not to talk to "anyone about the union" since he was precluded from further discussion of union problems (R. 25; Tr. 19).

C. Discrimination against Dulce Fumero

Fumero was first employed by the Company in 1963 and until the union election was considered a satisfactory and competent employee (R. 36). She was a moving force behind the Union's organizational drive, a fact well known to the Company (R. 24, 39; Tr. 234-235).

For about seven months prior to the election, Fumero performed sewing operations on swimsuits (R. 36; Tr. 33). She had never been criticized for her work and had also trained another employee to do the same type of work (R. 36; Tr. 30-32). A few days after the election, Manager Yoshida, in the presence of Fumero's immediate supervisor, Hazel Smith, charged Fumero with inferior work and returned 400 or 500 swimsuits sewn by her for her to repair (R. 36; Tr. 32-36). Fumero protested that the work was not faulty, but nevertheless she was directed to repair it (R. 36; Tr. 33-34). Approximately five days later, Yoshida informed Fumero that Hazel Smith would no longer accept any of her work without another supervisor's close inspection (R. 37; Tr. 37-38). Fumero replied that she was not a new operator, that she had worked in the plant on many jobs and was not irresponsible, and that an inspection procedure directed at her alone would make her "the object for a show for everybody" (R. 37; Tr. 38). She then requested Yoshida to give her "a layoff with a document so that [she] . . . could work elsewhere" (*ibid.*). Yoshida rejected her request, telling her that she could do what she wished and that a replacement for her was available from a list maintained by the State Employment Office (*ibid.*). Fumero told him that she felt "nervous" and "sick" and left the plant for the balance of the day (R. 37; Tr. 39, 40).

The following week, Fumero was assigned to darting beach robes, the plant's "simplest" sewing operation. However, she was also assigned Supervisor Genovena Sanchez as her

personal inspector (R. 37; Tr. 37-38).[7] Once more, fault was found with her work and many robes were returned for repair (Tr. 44-46).[8]

Within a week of her assignment to darting robes, Fumero approached Manager Yoshida and Efrem Young, the Company's President, stating that she was under a doctor's care for a nervous condition, and feared that her state of health was deteriorating because she could not work "with someone watching or looking over [her] . . . every minute" (R. 38; Tr. 48, 49). Young answered rhetorically: did she think that "to disrupt good work or employment permitted good treatment" and then terminated the conversation without letting Fumero reply (*ibid.*).

Finally, on May 6, after a doctor's appointment, Fumero informed Yoshida that her nervous condition was not improving and upon her physician's advice was requesting a month's leave for complete rest (R. 39; Tr. 51-52). Yoshida agreed to permit her return after she recuperated (*ibid.*). Approximately one month later, Fumero called Yoshida, informed him that her medical disability had ended and inquired as to when she could return to work (R. 39, 42; Tr. 54). She was told to report to the plant and did so the next morning (*ibid.*). Yoshida, at that time, informed Fumero that it would be impossible for her to return to work because of her nervous condition (R. 39, 42; Tr. 55).[9]

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[7] For Fumero as well as other employees, normal routine supervisory examination of their work product took place no more than three or four times daily. However, Sanchez inspected Fumero's work constantly on a piece-by-piece basis (R. 18; Tr. 41, 312). Furthermore, Sanchez was a brassiere department supervisor who had no other duties in the swimwear section where Fumero was employed (R. 37).

[8] Fumero was a piece worker, and repair work was not compensated for on a piece rate basis, but at a minimum hourly rate which resulted in her earning less money (R. 39; Tr. 289).

[9] Before the election, employee Geraldine Wilson overheard Hazel Smith, then Fumero's supervisor, relate to another employee that "as soon as the election was over . . . she had some plans for Dulce [Fumero]" (R. 23; Tr. 77).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by imposing discriminatory working conditions on Dulce Fumero, thereby causing her to leave her employment, and by refusing to rehire her.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner infringing upon its employees' rights under the Act. Affirmatively, the Board's order requires the Company to offer reinstatement to employee Dulce Fumero, to make her whole for any loss of pay suffered as a result of the discrimination against her, and to post appropriate notices. Finally, the Board ordered the election of March 31 set aside and ordered that an election by secret ballot be conducted among respondent's employees in the appropriate unit, at such time as the Board's Regional Director deems appropriate (R. 55-57).[10]

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[10] Since the Board's action in setting aside the election and directing a new one does not constitute a final order reviewable under Section 10 of the Act, it is not before the Court in this proceeding. See *American Federation of Labor v. N.L.R.B.*, 308 U.S. 401, 409; *Teamsters, Chauffeurs, Helpers and Delivery Drivers, Local 690 v. N.L.R.B.*, 375 F.2d 966, 968-969 (C.A. 9); *Urethane Corp. of Calif. v. Ralph E. Kennedy*, 332 F.2d 564, 565 (C.A. 9).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT

As shown in the Statement, respondent became aware of the Union's organizational campaign shortly after the first meeting of employees at Dulce Fumero's home. Respondent immediately reacted by threatening employees with reprisals if the union campaign was successful, coercively interrogating them with regard to their union activities and the union sympathies of other employees, prohibiting them from discussing the union, promising wage increases to discourage union activities, and creating the impression of surveillance. Thus, manager Mitsuo Yoshida questioned employee Dulce Fumero about her knowledge of the Union, and warned her that the Union would not keep its promises of benefits and that if she wanted such benefits she should seek employment elsewhere.[11] On another occasion, Yoshida summoned Fumero to his office, accused her of being "the initiator of the [union] problem at the plant" and prohibited her from soliciting for the Union. He further suggested that after the Company surmounted the union "problem," management would try to better wages (Tr. 25-26).

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[11] Conflicting testimony existed with respect to this and other conversations between employees and management representatives, requiring the Trial Examiner to resolve questions of credibility. The Board adopted his credibility findings. It is settled law that "the matter of credibility of the witnesses is not for this court to pass on. This is a function of the Trial Examiner and of the Board." *N.L.R.B. v. Thrifty Supply Co.*, 364 F.2d 508, 509 (C.A. 9). Accord: *N.L.R.B. v. Local 776 I.A.T.S.E.*, 303 F.2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826. We submit that the Trial Examiner's credibility resolutions which were adopted by the Board are entitled to affirmance here.

Immediately after the February 10 union meeting, Yoshida quizzed employee Geraldine Wilson about a rumor of a meeting among some of the girls and whether she knew anything about it. Wilson was also interrogated by Secretary-Treasurer David Young who wanted to know how the employees "felt" about the Union. Young also warned Wilson that if the Union won the election, the Company "would just as soon close down and forget it, because they couldn't meet union demands" (Tr. 73, 74-75).

Yoshida also called employee Juana Yanez to his office where he cautioned her to make sure she knew what she was doing with regard to plant unionization. Yanez was then advised that a union election victory would result in the plant losing contracts, the result of which would be "many people," including her two cousins, being without employment (Tr. 63).[12]

In early March, following an employee meeting, employee Ahyda Medina was interrogated by Yoshida as to whether the girls with her at the meeting were for the Union and also whether they had convinced her. Still later, Medina was again interrogated by Young who wanted to know if employee Ceceila Valencia was a union adherent.

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[12] Before the Board the Company argued that Yanez's testimony as well as that of other Spanish speaking employees is not entirely credible because of the language barrier which required the use of an interpreter at the hearing. However, it is to be noted that the interpreter, an experienced court linguist, was agreed upon by all parties concerned. Further, respondent made no motion to correct the transcript as reported. Therefore, the Trial Examiner's reliance upon witnesses' statements as interpreted was valid and proper. See *Lujan v. United States,* 209 F.2d 190, 192 (C.A. 10); *State v. Cabodi,* 18 N.M. 513, 138 P. 262, 263; *State v. Sauer,* 21 Minn. 591, 15 NW 2d 17, 20. Moreover, any interpretation is somewhat inexact due to language irregularities. Here, however, these invariable slight discrepancies in interpretation did not prejudice the respondent, whose anti-union animus and widespread coercive conduct formed the basis for the Board's findings.

Immediately preceding the election, Yoshida, while speaking to a small group of employees including Wilson and Yanez, told them "management was aware of those who signed cards and sent them into the union," and had "ways of finding things just like the union has" (Tr. 76). Finally, on the day of the election, Fumero was told she could no longer speak with anyone about the Union.

We submit that the foregoing evidence amply substantiates the Board's conclusion that respondent interfered with its employees' statutory rights in violation of Section 8(a)(1). Interrogating employees about their union sympathies: *N.L.R.B. v. Luisi Truck Lines,* 384 F.2d 842, 845 (C.A. 9); *N.L.R.B. v. Harrah's Club,* 362 F.2d 425, 428 (C.A. 9); *N.L.R.B. v. Security Plating Co.,* 356 F.2d 725, 728 (C.A. 9). Threatening reprisals for union activities: *N.L.R.B. v. Luisi Truck Lines, supra; N.L.R.B. v. Sebastopol Apple Growers Union,* 269 F.2d 705, 708 (C.A. 9); *N.L.R.B. v. Ambrose Distributing Co.,* 358 F.2d 319, 320-331 (C.A. 9), cert. denied, 385 U.S. 838; *N.L.R.B. v. V. C. Britton Co.,* 352 F.2d 797, 798 (C.A. 9); *N.L.R.B. v. Parma Water Lifter Co.,* 211 F.2d 258, 261-262 (C.A. 9), cert. denied, 348 U.S. 829. Creating the impression of surveillance: *N.L.R.B. v. Security Plating Co., supra;* also see *N.L.R.B. v. Prince Macaroni Mfg. Co.,* 329 F.2d 803, 805-806 (C.A. 1); *N.L.R.B. v. S & H Grossinger's, Inc.,* 372 F.2d 26, 28 (C.A. 2); *Hendrix Mfg. Co. v. N.L.R.B.,* 321 F.2d 100, 104-105 (C.A.5). Promising benefits during an election campaign: *N.L.R.B. v. Luisi Truck Lines, supra; N.L.R.B. v. Security Plating Co., supra; N.L.R.B. v. Kit Mfg. Co.,* 292 F.2d 686, 690 (C.A. 9); *N.L.R.B. v. Laars Engineers, Inc.,* 332 F.2d 664, 667 (C.A. 9), cert. denied, 379 U.S. 930; *N.L.R.B. v. Parma Water Lifter Co., supra;* see also *N.L.R.B. v. Exchange Parts Co.,* 375 U.S. 405, 409-410.

Respondent argued before the Board that its actions were merely trivial instances and that in fact, no employee was actually intimidated. However, coercive interrogation and

threats involving five employees and the President, Secretary-Treasurer, Plant Manager and other supervisors can hardly be considered trivial. Furthermore, violations of Section 8(a)(1) of the Act are not dependent upon a showing that employees are actually coerced. The test is whether the conduct tends to be coercive rather than "whether or not [employees] were coerced in actual fact." *N.L.R.B. v. Associated Naval Architects, Inc.,* 355 F.2d 788, 791 (C.A. 4). Also see, *N.L.R.B. v. West Coast Casket Co.,* 205 F.2d 902, 904 (C.A. 9) and cases cited, *N.L.R.B. v. Camco, Inc.,* 340 F.2d 803, 804, n. 6 (C.A. 5), cert. denied, 382 U.S. 926; *N.L.R.B. v. Kingsford,* 313 F.2d 826, 832 (C.A. 6); *Corrie Corp. of Charleston v. N.L.R.B.,* 375 F.2d 149, 153 (C.A. 4).

Respondent also contended that statements of Young and Yoshida regarding the Company's future if the union campaign was successful, were mere predictions or opinion protected by Section 8(c) of the Act. That section protects the expression of "views, argument or opinion" *only* when unaccompanied by threat of reprisal or promise of benefits. It did not, however, privilege statements by Young and Yoshida that the Union's victory would cause many people to lose employment, and that respondent would close down and "forget it" since it could not meet union demands. As the Fifth Circuit stated in *N.L.R.B. v. Nabors,* 196 F.2d 272, 276 (C.A. 5), cert. denied, 344 U.S. 865:

> [W]hen statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements whether couched in language of probability or certainty, tend to impede and coerce employees in their right to self-organization, and therefore constitute unfair labor practices.

Accord: *N.L.R.B. v. Geigy Co.,* 211 F.2d 553, 557 (C.A. 9), cert. denied, 348 U.S. 821; *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 728 (C.A. 9).

II.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY CAUSING TERMINATION OF THE EMPLOYMENT OF DULCE FUMERO AND BY REFUSING TO REHIRE HER

As the record shows, shortly after the union campaign began among respondent's employees, Manager Yoshida accused Fumero of being the "initiator" of the effort, and warned her to stop her attempts at "winning" employees over to the Union (Tr. 15-16). Both Yoshida and Secretary-Treasurer Young testified that they knew that Fumero was the prime mover behind the Union's organizational drive (R. 25, 39; Tr. 234, 235, 272, 279). The evidence is further clear that respondent had a strong desire to thwart the employees' organizational activities, and undertook by numerous unlawful means to do so. Thus, various employees were threatened with reprisals if the union campaign was successful, were coercively interrogated with regard to their union activities and were given the impression that their activities were under surveillance. Furthermore, Supervisor Hazel Smith informed another employee that "as soon as the election was over . . . she had some plans for Dulce [Fumero]" (Tr. 77).

Accordingly, immediately following the election, as shown *supra*, respondent embarked upon a course of conduct designed to harass Fumero and which ultimately caused her to quit. This effort was initiated by Manager Yoshida and Supervisor Smith who made her the target of criticism for allegedly defective work on 400-500 swimsuits. Fumero's work had never before been criticized, and she had, in fact, trained another employee to do the type of sewing on swimsuits that she performed. Despite Fumero's protest that her sewing of the swimsuits was not faulty, she went through the needless motion of resewing them, but again, five days later, new criticism was leveled at her. This time Yoshida

told her that Supervisor Smith (who previously had said that she had "plans" for Fumero as soon as the election was over) would not accept Fumero's work without another supervisor's close inspection. Despite her protests over the treatment she was receiving, Fumero, a few days later, was assigned to darting beach robes, respondent's "simplest" sewing operation, under the piece-by-piece inspection of Supervisor Sanchez. Once again, however, work was returned to Fumero which she had to repair at a lower rate of pay than she regularly earned.

As the Board held, a total view of the record leads to the conclusion that respondent's "fault-finding" of Fumero was a "sham aimed at humiliating and punishing her because she was a union activist" (R. 42). In reaching this determination, the Board found that the evidence failed to support respondent's allegations that Fumero's work after the election was deficient (R. 43). In this respect, it is significant that she was an experienced sewing machine operator who, in her three years of employment by respondent prior to the election, had worked on every type of sewing operation in the plant, including those in question on swimsuits and robes, and had given satisfactory service (R. 41; Tr. 30-33). Manager Yoshida conceded that prior to the election he had never received a complaint about Fumero's performance from any supervisor, and had never seen any inferior work by her (R. 41; Tr. 300, 301). Nevertheless, as part of respondent's discriminatory campaign against Fumero, immediately following the election, she was subjected to baseless criticism of her work, requirements of unnecessary "repairs" for which she was paid below her regular rate, and piece-by-piece inspection of her work which respondent knew embarrassed her in front of her fellow workers. When Fumero complained about the treatment she was receiving and indicated that it was making her "nervous" and "sick," Yoshida stated that respondent could get a replacement for her from the State Employment Office (Tr. 38, 39). Fumero complained again a short time later to Yoshida and Company President Efrem Young that she could not work with

someone watching her "every minute," and that as a result she was nervous and under a doctor's care (Tr. 49). Evidence of the fact that her union activities were the basis of all her troubles, however, was Young's response; he suggested that she could not "disrupt" conditions in the plant and expect "good treatment" (Tr. 49).

The Board reasonably concluded that unjustified fault-finding, impediment to her earning capacity and an intensive and unusual inspection procedure applicable only to her would rationally explain Fumero's feeling of humiliation and the emotional upset that she experienced (Tr. 41). The Board therefore rejected as incredible respondent's assertion that Fumero was not really incompetent, but that she intentionally produced faulty work because she wanted to be laid off so that she could draw unemployment compensation. This conflicts, in the first place, with the Board's finding that her work was not deficient. Secondly, since respondent's harassment of Fumero had produced a serious emotional upset requiring medical treatment, it strains credulity to suggest that she would have intentionally prolonged this condition by continuing to turn out faulty work. Finally, the record shows that Fumero had children of school age and as a factory worker presumably was dependent on her earnings (R. 41, 42; Tr. 289). It is unlikely in the extreme, therefore, that she would have deliberately sought discharge and cessation of her regular income. Furthermore, as is well known, California, in common with other states, denies unemployment compensation benefits to one discharged for misconduct.[13] The Board therefore found it altogether implausible to believe that Fumero would resort to so self-defeating a dodge as the misconduct attributed to her, which would have the effect of depriving her of the unemployment compensation she was allegedly seeking (R. 41).

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[13] California Unemployment Insurance Code, Sec. 1256 (Deering's Calif. Codes).

Since, as the Board found, respondent's campaign against Fumero was undertaken with the "aim of humiliating her, and making her employment burdensome and intolerable in order to induce her to quit and thus rid the plant of a union activist" (R. 43), it is hardly surprising that when she applied for reemployment after her month's medical leave of absence, she was told that it was impossible for her to return as there was no work for her. Obviously, for respondent to have restored her to a job at that time would be to undo the success that had been realized in removing her from the scene a month earlier.

In sum, the record provides abundant support for the Board's finding that respondent subjected Fumero to a discriminatory campaign of harassment that made her employment so burdensome and intolerable that she was forced to leave it on May 6, 1966, and that this course of conduct, as well as the refusal subsequently to reemploy her, was motivated by respondent's hostility to her union activity. Unquestionably, respondent thereby violated Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. Tennessee Packers, Inc., Frosty Morn Division*, 339 F.2d 203, 204-205 (C.A. 6); *N.L.R.B. v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 243 (C.A. 1); *Bausch and Lomb Optical Co. v. N.L.R.B.*, 217 F.2d 575, 577 (C.A. 2); *N.L.R.B. v. Monroe Auto Equipment Co.*, No. 24,881, decided April 4, 1968, 67 LRRM 2973 (C.A. 5), enforcing, 159 NLRB 613, 622-625; *N.L.R.B. v. Vacuum Platers, Inc.*, 374 F.2d 866, 867 (C.A. 7), enforcing, 154 NLRB 588.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

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May 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered Brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et. seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * *

APPENDIX B

Pursuant to Rule 18(2) (F) of the Rules of the Court (Numbers are to pages of the Reporter's Transcript).

Exhibit No.	Identified	Offered	Received in Evidence
General Counsel's			
1(a) through 1(v)	4	4	5
2	134	134	135
3	152	152	154
4	171	(not offered)	
5	243	(not offered)	
Respondent's			
1	201	201	202
2	202	202	203
3	203	203	203

No. 22,543

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

HOLLY BRA OF CALIFORNIA, INC., Respondent

On Petition For Enforcement Of An Order Of

The National Labor Relations Board

BRIEF FOR HOLLY BRA OF CALIFORNIA, INC.

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I

JURISDICTION

The Court has jurisdiction of the petition of the National Labor Relations Board herein pursuant to Section 10(e) of the National Labor Relations Act, as amended, [61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, 160(e)].

II

STATEMENT OF THE CASE

A. Preliminary Statement Concerning Scope Of Respondent's Objections To Enforcement Of Board's Order.

Respondent does not object to the enforcement by order of this Court of the Decision and Order of the Board, insofar as the Board has found Respondent in violation of Section 8(a)(1) of the Act by reason of its pre-election conduct. Thus, the Court need not concern itself with a review of the record upon those matters discussed under Point I-B of the Board's Statement of the Case nor in Point I of the Board's argument therein. Accordingly, sub-paragraphs (b) through (h) of the Board's recommended Order (R. 55-57) may be enforced without further consideration. Respondent does not agree that these findings are correct, but concedes that this portion of the Order should be affirmed by the Court upon normal application of the substantial evidence rule.

Respondent, on the other hand, will strenuously object to the enforcement by this Court of sub-paragraph (1)(a) and sub-paragraphs (2)(a) and (2)(b) of the Board's Order relating to its findings that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by discriminatorily causing the termination of employment of Dulce Fumero and by refusing to rehire her. (Board's Brief, Point I-C;

Argument, Point II).

The Board's Brief summarily dismisses Respondent's entire position herein in a footnote (fn 11, p. 8) to the effect that it is settled law that matters of credibility are not for the Court. Unfortunately, there do exist most substantial issues on this record which are quite properly before the Court, and the matter cannot be so easily disposed of by mere reference to broad rules of law.

B. Statement Of Facts.

Holly Bra of California, Inc. is a California corporation whose primary business is the manufacture of brassieres, both under its own label and also under the label of various retail stores for whom Holly Bra of California, Inc. manufactures this product. Because the work is seasonal and is very slow during the months of December, January, February and March, Respondent, for two or three years prior to the Union election, had obtained other contract work for the manufacture of swim suits and girdles (Tr. 192-194). At the time of the N.L.R.B. election in 1966, Holly Bra employed approximately ninety-eight employees in all phases of its business (Tr. 301).

Mr. Efram Young is the President of Holly Bra of California, Inc., and his brother, David Young, is its Secretary-Treasurer (Tr. 191). David Young was a witness for Respondent and is variously identified in the Transcript as "David" or "Young". (He will be referred to hereafter in this brief as "Young", and all other witnesses will be identified by their last names.)

Respondent's plant manager is Mr. Mitsuo Yoshida. He also testified on behalf of Respondent and was variously referred to by all of the witnesses as "Mitch" or "Yoshida". Hazel Smith was the direct supervisor over the alleged discriminatee, Dulce Fumero, in the swim suit or swim wear department (Tr. 345). Genoveva Sanchez supervised the brassiere

department but became involved with the alleged discriminatee, Dulce Fumero, during the sequence of events which are in dispute in this proceeding. (Sanchez appears in the Transcript as "Genovena", but her name was corrected by motion of General Counsel. (See, R. 22-23, fn. 5). Dulce Fumero had been in the employ of Respondent since 1963, and it is conceded that until some three or four days after the Union was defeated in the election, Fumero had performed her work satisfactorily. Commencing in approximately September, 1965, Fumero had been employed, as she was at the time of the election, to sew the front and back pieces of the swimming suits at the crotch. Her completed work was placed in bundles which were put into a bin and later transferred to two other employees, who worked on the over-lock machines, Sherley Thompson and Mary Pina (Tr. 160-164).

Respondent's witnesses testified in detail concerning the drastic decline in the quality of Fumero's work immediately after the election and to the circumstances surrounding her remaining days of employment. Despite the fact that this preponderance of evidence was contradicted only by Fumero, (The General Counsel produced no other witness upon this phase of the case), the Board credited Fumero and discredited each of Respondent's witnesses, either for alleged lack of credibility or upon claims of implausibility, which were based upon the Board's choice

of inferences, unsupported by the evidence. It is Respondent's position that, upon consideration of the entire record, which must be reviewed in a proceeding for enforcement of an order of an administrative body, the Board acted unreasonably and in excess of its powers by its findings that Respondent constructively discharged Fumero and by its order requiring Fumero's re-instatement with back pay. A detailed examination of the evidence bearing upon this issue is essential, and the summary statement of facts contained in the Board's brief is totally insufficient.

Sherley Thompson had been employed in the swim suit department of Respondent for some five years prior to this proceeding (Tr. 155). She and another employee, Mary Pina, were working on over-lock machines and were engaged in the manufacturing process upon the swim suits which immediately followed the work being performed by Dulce Fumero and one other girl (Tr. 159; 161). It was Thompson's job to put the leg elastic on the swim suits after Fumero had finished stitching the crotches (Tr. 156). Thompson testified that although Fumero's work before the election was good, "* * * all of a sudden, after the election, the work started coming through bad", and she couldn't work on it. (Tr. 156). Although one side of the swim suit was perfect, Fumero's work was defective, in that the other side was not done evenly and the jersey was sticking out of the suit (Tr. 158; 165).

The operation in the swim suit department required the production of approximately 300 suits per day (Tr. 161), and every suit during the period in question which Thompson received from Fumero was so defective that she could not complete her work upon them (Tr. 166). Thompson immediately called Hazel Smith and informed her of the defect and of the fact that the work would have to be repaired before it could be completed (Tr. 167).

The bundles of swim suits, as they come through the various processes, have numbers placed upon them so that the work of the operators involved can be identified (Tr. 157; 159; 169). Thompson testified that it was possible to recognize the difference in the stitch of the machines. She knew that it was the machine being operated by one of the two girls but did not know which of the girls it actually was until the number had been checked by the supervisor (Tr. 157; 170).

Thompson also testified that the work had to be repaired, and that she personally observed Fumero working on the returned work. She stated that she saw Fumero, who was supposed to be repairing the work, repair a total of only fifteen to twenty suits in an eight-hour working day (Tr. 157-158). Moreover, Thompson knew that a girl, whose name was Anna, had been required to come to work on a Saturday to do some of the repair work (Tr. 158).

As will be discussed hereafter, Thompson's testimony

was totally rejected by the Board upon the contention that her credibility had been destroyed because of supposed contradictions between her testimony at the hearing and a pre-trial statement concerning whether she knew that the defective work was Fumero's work, because she recognized the difference in the machine stitch.

Mary Pina, as noted above, was also employed on the over-lock machines for the purpose of putting the elastic on the swim suits (Tr. 174). Pina testified that three or four days after the election, the quality of Fumero's work changed (Tr. 175-176). According to Pina, girls worked by the bundle. They have a bin in which the swim suits are placed by the previous operator. They pick up the bundles and check the pieces in the bundles to see if the work is satisfactory. (Tr. 185). According to Pina, when she first noticed defects in Fumero's work, she found that every swim suit in the bundle was defective. This check is made because such an employee is a piece worker and, of course, does not get paid for the time spent in attempting to work on defective merchandise (Tr. 185-186). Pina supported Thompson's testimony that there was material sticking out from the crotch of the swimming suits worked on by Fumero, and that it was sticking out so much, she would have had to cut it which would have resulted in, as Pina vividly stated, "* * * a curve inside of your crotch, and I mean that's no quality". (Tr. 188).

When the improperly sewn garments came to Pina's attention, she showed them to her supervisor, Hazel Smith. (Tr. 175-176). She told Smith that she could not cut the work, because it would result in the garment looking "horrible" (Tr. 176). Pina knew that Fumero's work had a ticket number on it, but she did not know which girl had performed the work (Tr. 176-177). After the defective work had been shown to Supervisor Smith, Pina observed Fumero doing repair work upon the same garments. The garments had to be ripped apart and put back together again, and Pina observed Fumero doing the repair work. She, too, testified that Fumero would only repair about fifteen or twenty suits in an eight-hour day (Tr. 177; 180).

In her own broken English, Pina most succinctly summarized Respondent's evidence when she stated at page 179 of the Transcript as follows:

> "A It was after the election. It was all that bad work she did, and there were two girls doing it. This other girl -- we had stopped doing that work, because it had to be repaired. It was practically a whole lot of it, and this other girl, we had to work behind, which I am on piece-work. I lose money, because she wouldn't supply two girls."

The other girl, according to Pina, was doing "good work". (Tr. 187).

Again, as will be discussed later in this brief, the

entire testimony of witness Pina regarding the defects in the work performed on the swim suits by Fumero and the necessity of repairing these suits before they could be finished was rejected by the Board, merely because Pina hesitated momentarily before admitting the identity of a Union organizer who had attempted to force a pamphlet upon Pina some seven months before the hearing.

Mitsuo Yoshida, Respondent's Plant Manager, was informed of the inferior work by supervisor Hazel Smith three or four days after the Union election. Smith called Yoshida to come upstairs and showed him the improperly sewn swim suits. Smith and Yoshida discussed the problem and were of the belief that the error had been made in the cutting operations performed on the garments before they were given to the operators to sew. However, they checked it out and discovered that the error was not made in the cutting, but that it was the operator's fault. The work was subsequently identified as Fumero's work from her clock number which was on the bundles of garments (Tr. 280-281). There were many bundles of inferior work, consisting of several hundred garments. All of the inferior work was that of Fumero and was not the work of the other girl. (Tr. 294-296). The bundles of inferior garments were assigned to Fumero to repair (Tr. 297). Yoshida observed Fumero ripping the crotches open and resewing them for a period of approximately

ten days. (Tr. 281; 297). In addition, other girls were assigned to help her repair the defective suits (Tr. 297-298).

Respondent has a system of normal inspection by the supervisors. Once or twice in the morning and again in the afternoon, the supervisors will check the work of the employees (Tr. 282; 284). Each employee's work is inspected every day by the supervisor, and, according to Yoshida, a similar inspection was made of Fumero's work after the election. (Tr. 282). However, when Smith and Yoshida were standing approximately 20 to 25 feet away from Fumero's machine discussing the poor work then being performed by Fumero, Fumero called Smith a filthy name in Spanish. Yoshida did not understand the word in Spanish, and Smith refused to tell him, but started to cry and stated that she was not going to work any more. (Tr. 283). In order to continue with the regular inspection, Yoshida assigned another supervisor from a different section to check Fumero's work (Tr. 282). It was decided that Smith would not have anything to do with inspecting Fumero's work but would stay away from her (Tr. 284). In this connection, Pina testified that Smith and Yoshida were not discussing Fumero but were in fact discussing the work. She heard Fumero call Smith a whore in Spanish. (Tr. 181-183).

The following morning, Yoshida called Fumero into his office. Although Yoshida is, to a great extent, capable of

speaking Spanish, he uses the Castilian version, and, in matters of importance, he uses an interpreter to avoid misunderstandings. (Tr. 276). Thus, on this occasion, he had Geneveva Sanchez in the office with him. Yoshida told Fumero that she was a good operator, was capable of doing better work than she was doing; that he did not "* * * want her to be calling anybody any names * * *" and asked her to go about her business, do her work and mind her own business. Fumero had tears in her eyes and stated she wanted to go home, but Yoshida told her that it would not "look nice" and to take a drink of water, rest and go on back to work. (Tr. 285).

When the repair work was completed on the swim suits, Fumero was assigned a rather simple operation on what was referred to during the hearing as "robes". Yoshida personally observed her subsequent work upon the robes and testified that it was of poor quality. He stated that "* * * the darts were sewn too short, so that the holes came in through the front". (Tr. 290). Fumero worked on these robes for approximately two to three weeks, and sixty to seventy percent of this work was also defective. Fumero was assigned to repair the defective robes, and other girls were also required to work on them (Tr. 298).

Fumero's last day of employment with Respondent was May 6, 1966. On this date, Fumero came to Yoshida with a slip from her doctor. She informed Yoshida that the doctor

did not want her to work, and that she was going to take time off for three to four weeks. Yoshida asked her if she was going to come back when she was better, and Fumero replied that she was not and was going to look for work elsewhere (Tr. 287).

Approximately three to four weeks later, Fumero called Yoshida and "* * * asked me if I had work for her". (Tr. 287). Yoshida requested her to come in and see him personally, which she did some four to five weeks later. Yoshida testified that:

> "A She said she was on her way to the Employment Office, and that the doctor didn't -- couldn't give her anymore disability, that her disability was up.
>
> "She actually said that she didn't want to work, and that she was going to go to the Employment Office, and she wanted to know what I would answer on the form that came from the Employment Office when we got it, and I told her that I would tell the truth, that we have work for her, but she didn't want to work.
>
> "She said, 'Well, if you want me to go back to work, I am going to do the same type of work.'
>
> "I says, 'I couldn't afford to have you do the same type of work you done before.'" (Tr. 288).

Yoshida also testified that Fumero told him that she

wanted to be off work while her children were out of school. (Tr. 289). Respondent had work available for Fumero at the time of this conversation (Tr. 288).

The records of Respondent, examined by Yoshida during the hearing, revealed that Fumero was given leaves of absence from July 18th through October 17th, 1964, and also from October 2nd through October 30th, 1965. (Tr. 289; 305).

David Young, the Secretary-Treasurer of Respondent, who was also in charge of liaison and contract work (Tr. 191), was advised by Yoshida of the inferior work then being performed by Fumero, shortly after Yoshida had first examined this merchandise. Young went upstairs to the machine where she was working. (Tr. 229; 245). Young explained that there are two pieces of material in the swim suit operation, a front and a back with a jersey lining. These two pieces at the seam are required to be even on both sides so that in the next operation, when the elastic is put on, the elastic can be edged around the bottom of the swim suit. A tolerance of between 1/8th and 1/4th inch is permissible. However, as Fumero was then performing the operation, the swim suits were even on one side but were from a half inch to as much as an inch and a half off on the other side. In other words, "The work was uneven on one side on every garment * * *". (Tr. 229-230). Young told Fumero that her work could not go through the next operation, and Fumero replied that "* * *this is the best I can do".

(Tr. 230).

Shortly after Fumero had made some of the repairs on the swim suits which were made necessary by reason of her improper seaming, she was placed on the robes or beach "cover-ups". As witness Young explained, they did this because it was simplest operation that she could perform and because "* * * she was fighting us on the other one, and we wanted to give her every chance and every benefit, * * *". (Tr. 233). In this latter operation, Fumero was required to make the bust darts. "The dart is made by putting the side seam pieces together, * * * and inverted and sewed at an angle in order to form a bust cup". (Tr. 232). Darts are run between two marks or notches placed on the side seam of the material. A drill hole is drilled through the layers of material when they are being marked for cutting. After the dart is put into the garment, the hole is supposed to be hidden on the inside of the garment within the seams and becomes part of the inside seam. (Tr. 232-233). However, as explained by Young, when Fumero "* * * sewed the darts she sewed them short so that when you open up the garment the holes show, and we have defective merchandise. (Tr. 233).

At the time that Young saw the defective work on the swim suits and Fumero had told him that she was doing the best she could, Young called Respondent's attorney for advice and was instructed by him to inform Fumero that

she had to do her work properly. (Tr. 246). Similarly, when the later problem arose with the improper sewing of the darts on the robes, Young told Yoshida to call the attorney again to find out what to do, because, as he stated "* * * I never figured she would be messing up this work". (Tr. 248; See also, testimony of Yoshida at Tr. 286).

According to Young, approximately 400 or 500 swim suits were damaged by Fumero to the extent that they had to be repaired. Fumero worked on the repairs for approximately two weeks, and, in addition, some of the garments were given to Eva, who came in on several Saturdays to help with the repairs. (Tr. 250-251). Even after the initial group of suits was repaired, Fumero's work on the swim suits was very inconsistent. As Young put it, "We would get a good day's work, and then we would get a day's work that was three quarters, and then we had to return some to her". It was for this "exasperating" reason that Fumero was placed on the robes, which operation, Young explained, could be taught to anyone within five minutes. (Tr. 252).

Young also testified, in his direct examination, that on three occasions Fumero had asked him for a layoff so that she could collect her unemployment insurance. (Tr. 211; 212; 218-219). The Board discredited Young entirely

on the basis of his testimony upon this matter.

Hazel Smith was Fumero's immediate supervisor in the swim suit department. According to Smith, she had never had trouble with Fumero prior to the election and was friendly with her. (Tr. 339). About five days before the election, Fumero stated that Young was going to give her a layoff. Smith did not believe this, because there was work to be done. She called Young who denied telling Fumero that she was to have a layoff, and Smith told her to go back to her machine, because there was a lot of work. (Tr. 340). Smith corroborated in full detail the testimony of Thompson, Pina, Yoshida and Young. Both Pina and Thompson called Smith's attention to Fumero's work on the swim suits, and Smith testified that she told them that the suits could not be cut as much as would be necessary because of the manner in which they were sewn. (Tr. 340). As Yoshida testified, Smith confirmed that she called him to come up to see the bad work that had been accumulating in the bin. (Tr. 340-342). The conversation with Yoshida occurred at about five minutes after 4:00 P.M. and took place at a table close to Sherley Thompson's machine. (Tr. 349). A boy from the cutting room who had been blamed for the bad work was also present (Tr. 350). Fumero, who was not a part of the conversation, came by Smith and Young and used the profane word, as related by Yoshida. Smith told

Yoshida that she was quitting and later began to cry. (Tr. 343). A day later, Smith went to check Fumero's work and was told by Fumero, "Don't bother checking my work. Don't lose your time". (Tr. 344). Smith responded that she would check her work even if Fumero was there for six years. Later, Smith told Yoshida that she did not want to check Fumero's work any more, and they should have someone else do it. It was at this time that Sanchez took over the inspection. (Tr. 344). Smith explained to Sanchez how the work should be done and how it should look after it was finished. (Tr. 354).

According to Smith, Fumero did repair some of the work on the swim suits, as did other employees in the plant. (Tr. 345). Smith also personally observed Fumero's performance on the robes and testified that it was poor work which had to be repaired, because Fumero was finishing the dart before the punch hole so that the punch hole would show on the outside. (Tr. 346). The improper performance on the robes lasted for about a week, and from that time until her termination, Smith was of the opinion that the quality of Fumero's work was satisfactory. (Tr. 347).

Geneveva Sanchez had been employed by Respondent since 1954, and at the time of this proceeding was employed as a supervisor. She first learned of the problem with Fumero's sewing when Yoshida told her to inspect Fumero's work

following Smith's refusal to do so after having been called a filthy name by Fumero. (Tr. 309). As Sanchez was not familiar with the fabrication of swim suits, the work was shown to her, and she was told what was to be inspected. (Tr. 310). Because she had her own department and had to check the girls in her department, she would leave that department and go down and check Fumero's work; however, she apparently did little checking on the repairs of the swim suits, for, as she testified, she inspected mostly the robes. (Tr. 327). She did, however, see Fumero ripping the defective swim suits and saw the other girls working on Saturdays making the repairs. (Tr. 310). For approximately one week, Sanchez checked Fumero's work on the robes, and she found quite a few which had to be fixed. Her estimate was approximately fifty pieces. (Tr. 312-313). The problem with Fumero's work in this connection was summarized by Sanchez as follows:

> "It is run in a straight line, so it covers the hole, the punch-hole, and if you can't see the punch-hole, then, you're blind, because all you have to do is pass it, and you pass it all right, but you stop before it is no good."

Sanchez inspected Fumero's robes for from five to eight days. She then stopped inspecting them "* * * because she was making them very nice." (Tr. 329).

Sanchez also corroborated Young's testimony that Fumero could speak English well, if she wanted to, and she understood English. (Tr. 321). However, Sanchez customarily spoke to her in Spanish.

According to Sanchez, Fumero, after the election, told her many times a day that she wanted to get laid off and, in fact, asked her about it five times in one morning. (Tr. 315). Later, Fumero was off for a few days and when she returned, she told Sanchez that she was ill and would have to take some time off. Sanchez called Yoshida, who requested that she bring Fumero to his office downstairs. Sanchez testified that on this occasion Fumero did, in fact, state that she was going to take time off so that she could collect "disability", and that she had no intention of coming back, as she would like to work elsewhere. (Tr. 315-316). Finally, Sanchez confirmed Yoshida's testimony that Fumero, after her disability period was over, wanted to collect unemployment insurance until her children were out of school. (Tr. 335).

The issue before the Board, raised by Respondent's evidence, was whether Dulce Fumero, deliberately or otherwise, spoiled several hundred garments, and whether Respondent was, therefore, justified in refusing her re-employment after her return from several weeks' absence for alleged medical reasons. The Board's findings that

Respondent harassed Fumero into leaving her employment and later discriminatorily refused to re-employ her, were based entirely upon Fumero's testimony and upon the complete and absolute exclusion of all of the evidence given by Respondent's witnesses. Despite the fact that the Board discredited much of Fumero's testimony upon other issues, the Board credited her testimony in its entirety upon this phase of the case, applying a far less rigid standard to her testimony than it applied to Respondent's witnesses.

The contradictions and exaggerations in Fumero's testimony, and the most evident lack of credibility therein, will be discussed in a succeeding section of this brief. Insofar as the issue of her work performance is concerned, it is safe to say that Fumero dismissed the entire matter. She admitted that during the first week after the election, Yoshida returned some 500 pieces to her for repair. (Tr. 32). Although denying that some of the work was hers, Fumero admitted that she spent about four or five days repairing the work. (Tr. 34-35). However, she then testified that she changed "nothing" on these pieces, and that "It is just one big party that they had around me there". (Tr. 36; 67). Later, Yoshida told her that she was finished repairing and that she was being placed on a new job (Tr 37), because Smith would not accept any more of her work without inspection. (Tr. 38). On the occasion of this conversation, Fumero testified most significantly that:

"So then I said to him, what else do you pretend to do with me, with all of this intrigue and all of these calls, that I was not a new operator, neither an irresponsible person, and that for the period of three years that I had worked on different jobs at this plant, so that at the end I would be the object for a show for everyone, to take me out of the plant with a document -- to give me a layoff with a document so that I could work elsewhere.

"So then he said that I would have to accept that because he was the boss there, that he had a list from the employment soliciting employees -- to give me my layoff, that I could go, or do whatever I want that he -- that it didn't concern him."

(Tr. 38).

Regarding Yoshida's alleged reference to solications for employment, she then testified that he meant from the California Department of Employment and that he said he could not give her a layoff. (Tr. 39). Upon being asked to repeat the conversation, Fumero added the fact that "* * * so then I told him that I would work half a day, or two hours, or no work at all, and he told me that you do what you want, because there is a law here at the plant, so that day I left at half a day, and I left all of that work there

to him". (Tr. 39).

Fumero admitted that she was placed upon the work of sewing "darts" on the robes (Tr. 41-43) and admitted that many of them were returned to her because they were defective, but claimed that "* * * no one sews with such an exactness, that no one sews with such an exactness that it is necessary to be measuring piece by piece with care". (Tr. 45). She also complained that she was being inspected constantly and that she could not "* * * support this kind of a thing, * * *". (Tr. 49). On this occasion, she had spoken to Yoshida about her working conditions in the presence of Sanchez and Efram Young, and testified that the latter commented, in her words, "* * * if I thought that trying to disrupt a good work or employment permitted good treatment, * * *", but she then claimed that he refused to discuss the matter with her. (Tr. 49).

A few days later, Fumero told Young that she could no longer continue working there; that it was impossible for her to continue; that every day was a different problem; that she was sick and could no longer "resist" days like that. She then said that Young offered to talk to Yoshida and told her that he would pay her the same that she had been earning. (Tr. 50).

Fumero had "an extreme case of nerves" that started at the first Union meeting at her house in February, and had been under a doctor's treatment during the entire

period. (Tr. 53). On her last day of employment (May 6, 1966), she told Yoshida that her ailment was not improving; that her doctor told her she needed a complete rest; that she was not going to work; and that after she got well, she would have to return to work (Tr. 52).

During June, 1966, Fumero telephoned Yoshida after being released by her doctor. Yoshida told her to come in to see him in person, as he did not wish to talk on the telephone because of language difficulties (Tr. 54). When she saw him a day later, she claimed that she was told, in response to her question, "* * * if he had any work for me, * * *", that he was sorry but it was impossible because Smith was boss and she became nervous with Smith. To this statement, Fumero replied, "* * * okay, that's what I wanted to know". (Tr. 55).

C. Statement Of The Board's Findings Of Lack Of Credibility Of Respondent's Witnesses.

The Board held that Respondent's so-called fault-finding with Fumero's work performance "* * * was a sham aimed at humiliating and punishing her because she was a union activist" (R. 42); that Fumero was a target of managerial discrimination (R. 43); and of a plan to humiliate and harass her into quitting her employment (R. 44). These findings and conclusions by the Board were bottomed upon its total rejection of all of the evidence of Respondent's witnesses. The fact is that the detailed testimony

of Respondent's witnesses concerning the inferior sewing performed by Fumero was scarcely discussed by the Board.

The evidence upon which the credibility findings were actually based must be discussed in some detail in order that a full understanding of the Board's error may be made clear to the Court.

Mary Pina: Her testimony was rejected by the Board upon the contention that "Pina appears to have some bias against the Union's organizational effort, and was less than candid about it". (R. 40). This alleged bias and lack of candor were based entirely upon a few questions and answers concerning her recognition at the hearing of a Union organizer and whether during the election campaign, some seven months earlier, she had told the organizer to drop dead. In response to the question of whether she had seen the person before, the witness responded, "Maybe I have. Maybe I haven't". When asked by the Trial Examiner if she recognized the lady, the lady's recorded answer was "No --I guess I have". Pina admitted the woman looked familiar and then was asked if in fact she told the lady to drop dead, to which the witness responded, "Maybe I did". The questioner interrupted the witness' complete answer, that "She was forcing that paper on me". (Tr. 188-189), which she did not want.

Sherley Thompson: A similar challenge was made to the credibility of Thompson, the other over-lock machine

operator who followed Fumero's work. In Thompson's case, she was charged by the Board with testimony "attended by" self-contradiction. (R. 41). This entire charge was based on the claim that she first testified that she was familiar with the "machine stitch" of Fumero and recognized it and then "altered course" and claimed she did not know which of the operators had done the work. It was also contended that her testimony at the hearing was contrary to a pre-trial statement.

Thompson testified on direct examination that after the election, "* * * the work started coming through bad". She was asked if she knew whose work it was and her response was "No". (Tr. 156). On cross-examination, she was asked if she knew from whom the suits came, and her answer was that she didn't know until after the supervisor told her. (Tr. 168). Thompson repeated this answer after being questioned about the use of the ticket numbers to identify an operator's work. She was then asked the following questions and gave the following answers:

"Q Couldn't you tell from the stitch of the machine?

"A You mean, could I tell it was Dulce's work or not?

"Q Yes.

"A No two machines have the same stitch. Each machine has a different stitch.

"Q Could you recognize Dulce's machine stitch?

"A Yes.

"Q And did you recognize it when you saw this defective work?

"A Yes.

"Q So you did know that it was Dulce's work right when you looked at it the first time?

"A As I say, I didn't know who it was. It was between one of the two girls, and I didn't know which one it was."

(Tr. 170).

Thompson is also charged with changing her testimony regarding her complaint to management concerning the defective work. She testified on direct examination (Tr. 157) that she talked to Hazel Smith and that Smith called Yoshida. In a pre-trial statement, Thompson said that she "complained to Mitch". (Tr. 172). So far as her recognition of Fumero's work is concerned, Thompson's pre-trial statement contained one sentence on the subject: "I knew it was her's because each machine's stitch is different, and the operator's clock number is on the bundle, and each girl ties the bundle differently". (Tr. 172).

David Young: Young was charged by the Board with the disposition to shape his testimony to what he conceived to be the necessities (R. 29) and, again, with the propensity toward self-contradiction and exaggeration (R. 42).

In his direct examination, in response to a question concerning Fumero's testimony that Young had said he would

lay her off after the election, his response was that the only conversation was that "* * * she asked me on more than one occasion to lay her off so she can collect unemployment insurance". (Tr. 210).

He was specifically asked about only three of the conversations during his direct examination. (Tr. 210-213; 218). On cross-examination, the witness was first asked about the three conversations concerning which he was questioned by counsel for Respondent. (Tr. 236-238). On resumed cross-examination, he was again asked regarding the number of conversations and responded that it would be only an approximation, but at least a half dozen times, if not more. (Tr. 241). The Board contended that Young's pre-trial statement that: "She asked me twice about being laid off" (Tr. 244), was evidence impeaching the credibility of his testimony at the hearing.

In regard to a conversation with Fumero concerning layoff at which Geneveva Sanchez was present, Young was asked by the Trial Examiner where the conversation took place, and then if the witness recalled why Sanchez was present. Young responded that he could have called her in "* * * because Dulce speaks English very well, but when she gets a little bit excited she can put wrong words into the -- I wanted to make sure I understood what she said". (Tr. 219). Again, the Board, affirming the finding of the Trial Examiner that Fumero did not speak English, used

this testimony as further grounds for contending that Young lacked credibility by reason of a gratuitous injection of this claim into his testimony in the expectation of discrediting Fumero.

Geneveva Sanchez: The Board disbelieved all of the testimony of Geneveva Sanchez upon the claim that it was "exaggerated" (R. 42). The sole basis of this claim of exaggeration was the testimony of Sanchez that Fumero, after the election, told her many times a day that she wanted to get laid off and once asked her about it five times in a morning. (Tr. 314-315). The Board disbelieved the testimony on the grounds that it did not think that Fumero would come to Sanchez with such a statement during the short period of time that Sanchez was inspecting Fumero's work. The Board also contended that it was not plausible, because the function of laying off personnel belonged to Yoshida, even though Sanchez also testified that she told Fumero to go see Yoshida or Young because "That wasn't my department". (Tr. 315).

Mitsuo Yoshida: The Board rejected Yoshida's evidence in all of its substantial particulars concerning the poor quality of work being done by Fumero; the amount of inspection performed on her work and its alleged difference from ordinary inspection; and finally his conversations with Fumero and her alleged statements both at the time she quit her employment and at the time she allegedly returned

seeking re-employment. It is difficult to determine the exact basis upon which much of Yoshida's evidence was disbelieved, for the reason that in many instances the Board's alleged disbelief is coupled with its findings upon the evidence of other witnesses or its apparent selection of inferences raised by various phases of the testimony. However, it is probable that the root of the Board's disbelief of Yoshida is in its rejection of Yoshida's version of his conversation with Juana Yanez. (See, R. 28 and 29). Yanez testified that Yoshida approached her at her machine, told her he wanted to speak with her, and that she went to his office. She then testified to the conversation which was adopted by the Board in a portion of its findings relating to the 8(a)(1) phase of the case. The examination of Yanez was first attempted in English, and her answer to the questions concerning this conversation were then repeated through the interpreter. The answers were vague and disconnected, and it is utterly impossible to determine from the answers exactly what took place. Specifically, it cannot be determined from the direct testimony of Yanez whether, in fact, she brought up the Union or Yoshida did. The Board, however, assumed that Yanez meant by her answers that Yoshida broached the subject of the Union. Yoshida was not questioned extensively during his direct examination about this conversation, but it is fair to say his version

did differ in many particulars with the version of Yanez. However, the Trial Examiner asked the witness how the matter of the Union came up, and the witness' response was "I don't know whether she brought it up or whether I brought it up". (Tr. 268). The Board contends that this answer, along with his "unwillingness" to explain why he did not want to talk to Yanez at her machine, showed Yoshida to be an evasive witness. (R. 28-29).

III

STATEMENT OF QUESTIONS PRESENTED IN OPPOSITION TO PETITION FOR ENFORCEMENT

1. Whether the Board's Order, which was based solely upon the uncorroborated testimony of the charging-witness, is supported by substantial evidence upon the record as a whole or is so clearly erroneous that enforcement must be denied?

2. Whether the Board arbitrarily and erroneously rejected the entire evidence of each of Respondent's six witnesses for alleged lack of credibility without cause or reason to believe that these witnesses willfully gave false evidence upon material issues?

3. Whether the Board arbitrarily and erroneously applied rigid and severe standards of credibility to Respondent's witnesses but failed to apply similar standards to the charging-witness and wholly excused her testimonial shortcomings?

4. Whether the ultimate fact found by the Board, i.e., that Respondent discriminatorily harassed Fumero into quitting her employment by needless faultfinding, was based upon an inference, entirely unsupported by any evidence in the record, that she would not have courted discharge by deliberately doing poor work because she needed employment for support of herself and her children?

5. Whether the aforesaid ultimate fact was also based upon an entirely speculative and conjectural inference, without evidentiary support, that Fumero, a formerly good worker, would not and could not have become suddenly incompetent?

6. Whether the inference drawn by the Board that Respondent engaged in needless faultfinding was unreasonable by reason of the fact that the Board supported such inference by selection of certain favorable testimony of Respondent's witnesses and by improperly rejecting unfavorable testimony upon the same subject matter?

7. Whether the Board failed to make a reasonable choice of the possible inferences raised by the entire evidence and failed to consider the only reasonable inference that Fumero's poor work performance was caused by her nervous illness?

IV

SUMMARY OF ARGUMENT

The findings and conclusions of the Board are not supported by substantial evidence upon the record as a whole and are so clearly erroneous that the Board's petition for enforcement must be denied. This Court is not merely a judicial echo of the Board; it has the power and duty to set aside an order of the Board whenever the Court cannot conscientiously find that the evidence supporting the decision is substantial or when it is left with the conviction that error has been committed.

The Board arbitrarily credited only the testimony of the alleged discriminatee, a highly prejudiced and interested witness, and discredited all of the testimony of Respondent's witnesses to the contrary. Respondent's witnesses were charged with lack of credibility by reason of testimony upon peripheral matters not directly related to the principle issues and were not found to have given willfully false testimony upon a material question. Therefore, the harsh doctrine of falsus in uno, falsus in omnibus was erroneously applied by the Board. Furthermore, a dual standard of credibility was applied, in that the inconsistencies, exaggerations and contradictions of the charging-witness were excused, but the witnesses for Respondent were held to an impossibly rigid standard.

Inferences were drawn by the Board that were not supported by any evidence in the record or which were purely speculative and conjectural. In order to sustain its conclusions of ultimate fact, the Board improperly drew inferences by selection of certain testimony of witnesses, while ignoring or rejecting other testimony upon the same subject matter. The Board failed to examine and consider all of the reasonable inferences raised by the facts established by the record. Its choice of inferences was unreasonable and cannot be sustained upon fair consideration of all of the evidence which detracted from the conclusions reached.

The only fair, just and reasonable conclusion from the evidence in the record is that Respondent did not discriminate against Dulce Fumero, either before her voluntary separation from employment or at the time she later returned when her disability excuse had expired. Fumero, suffering from a nervous illness, damaged more than 500 garments through careless and inferior work. Contrary to the Board's accusation of "needless faultfinding", Respondent patiently tolerated her deficiencies. Fumero eventually quit her employment voluntarily for medical reasons. She did not return upon a genuine search for employment, but only to obtain an excuse enabling her to obtain unemployment insurance benefits, and, in any event, Respondent had a lawful right to refuse to re-employ Fumero by reason of her prior

faulty work performance.

The uncorroborated testimony of the person who will benefit from a favorable decision cannot constitute the measure of substantial evidence required to support a decision. Labored and strained inferences improperly drawn without support from the evidence, coupled with unjustifiable impeachment of all of the witnesses for Respondent, cannot be permitted to overcome the clear weight of the evidence in the entire record.

Respondent respectfully submits to the Court that the findings of the Board, upon the record of this proceeding, do not reflect the truth and right of the case, and enforcement of the Board's order against Respondent would be manifestly unjust.

V

ARGUMENT

A. The Board's Petition For Enforcement Should Be Denied For The Reason That The Decision Is Not Supported By Substantial Evidence And Is Clearly Erroneous.

The findings of the Board upon the issue of the alleged discrimination by Respondent against Dulce Fumero are "so against the great preponderance of credible testimony", that these findings do not "reflect the truth and right of the case". (2B Barron & Holtzoff 549-550). A finding is clearly erroneous when "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'". (McAllister v. U.S., 348 U.S. 19, 20; 75 S. Ct. 6, 8).

Contrary to the contentions of the Board, this Court is bound by neither the Board's rulings upon the credibility of witnesses nor by its Findings of Fact. "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both". (Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490; 71 S. Ct. 456, 466).

The United States Supreme Court in its decision in the Universal Camera case defined the scope of review of an administrative record by a Court of Appeals. The Court held that the entire record must be taken into consideration and that "* * * a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view". (340 U.S. 474, 488; 71 S. Ct. 456, 465). It is generally true that Appellate Courts will not substitute their judgment for that of the Board upon matters of credibility or upon choices of possible inferences. Nevertheless, "Administrative determinations of credibility are often set aside because the reviewing court firmly believes that the evidence supporting the determination is clearly less credible than the opposing evidence". (4 Davis; Administrative Law 145, § 29.06). And, where the Board has drawn unreasonable inferences from the evidence, this Court will deny enforcement of the Board's order. (N.L.R.B. v. Sunset Minerals, Inc. [CA-9 1954], 211 F. 2d 224).

The primary issue of fact before the Board in this phase of the proceeding was whether Fumero, consciously or unconsciously, damaged more than 500 garments because of inferior work performance or whether, as found by the Board, Fumero was harassed and humiliated into quitting her employ-

ment by the "sham" insistence of Respondent that her work was faulty. As a subsidiary issue, there was the question whether, after returning from leave of absence, Fumero was genuinely seeking employment, as asserted by the Board, or whether she was, in fact, attempting to obtain an excuse from Respondent that would permit her to obtain unemployment insurance benefits.

Six witnesses, including both supervisors, and non-supervisory employees, testified in Respondent's defense. Their testimony was without contradiction or inconsistency upon any material issue. The evidence given by these witnesses was clear and convincing upon two significant issues. First, that Fumero did, in fact, commence performing her assigned task in a most inferior manner shortly after the election, and, secondly, that upon her return from a leave of absence due to nervous illness, she was not seeking employment, but wanted an excuse that would enable her to draw unemployment benefits. Respondent's witnesses testified to their observations of her defective sewing upon the swimsuits and upon the beach robes; to the fact that she, as well as other employees, spent many days ripping apart the seams of these damaged garments and repairing them; to her insubordinate insult to her supervisor; and finally to her efforts to obtain an excused layoff.

Although it is true that Fumero denied the evidence of Respondent's witnesses, albeit with many contradictions,

the preponderance of the evidence convincingly supported Respondent's contentions. The record leaves no room for doubt that Fumero's work suffered a drastic decline in quality before she finally left her employment because of her illness and that Respondent had good and sufficient cause for refusing to re-employ her even had she genuinely sought to return. There is utterly no support in the entire record for the inference drawn by the Board that Respondent engaged in needless faultfinding for the purpose of humiliating Fumero and discriminatorily refused to re-employ her.

Even though the Board did not, and upon this record could not, charge the witnesses for Respondent with giving willfully false testimony, nevertheless, the Board rejected all of the evidence of Respondent's witnesses and relied entirely upon the uncorroborated testimony of Fumero and "upon tidbits of evidence picked from here and there" from the record (N.L.R.B. v. Mallory & Co. [CA-7 1956], 237 F. 2d 443). Fumero was not a wholly trustworthy witness whose evidence was reliable to the exclusion of all else. She first admitted that she worked upon the repairs in one answer and then changed course and asserted that there was really nothing to be repaired and contended that it was just a "big party". Later, Fumero denied that she ripped and repaired even for "one moment". She admitted that the robes were returned to her, because they were defective, but complained that she was being asked to sew with too much exactness. She

admitted that she had had an "extreme case of nerves" which had commenced with the first Union meeting at her home in February and admitted that she asked for time off at the suggestion of her doctor.

And, again, even though denying that in June, 1966, she was actually seeking an excuse that would enable her to draw unemployment benefits for the summer, Fumero testified quite significantly that when Yoshida told her she could not work there any more, her reply was, "Okay, that's what I wanted to know". This was hardly the response to be expected of a person who desperately needs employment, as inferred by the Board. On the contrary, it is the response that might be expected from an individual who had just obtained the desired excuse for the employment office.

Despite the fact that forty-three employees of Respondent voted for the Union in the election and, presumably, had direct knowledge of the circumstances surrounding Fumero's last weeks of employment, the General Counsel failed to call a single one of these employees to rebut Respondent's case.

Fumero's evidence on this point was entirely presented through the words of an interpreter and was brief to the point of being sketchy. It is also significant that when she was recalled upon rebuttal at the conclusion of Respondent's case, she was examined by the General Counsel only with reference to the questions concerning her statements

regarding her desire for a layoff and whether she told Yoshida that she did not wish to return to work.

The findings of a Trial Examiner, affirmed by the Board, that "* * * are based primarily on the uncorroborated testimony of the party who stands to benefit from an award of re-instatement and back pay * * * may not constitute substantial evidence". (N.L.R.B. v. Ogle Protection Service [CA-6 1967], 375 F. 2d 497, 506 [cert. den. Oct. 9, 1967, 36 LW 3144]; citing its earlier decisions in N.L.R.B. v. Elias Brothers Big Boy, Inc., 327 F. 2d 421, N.L.R.B. v. Barberton Plastics Products, Inc., 354 F. 2d 66).

The Ogle Protection Service, Barberton Plastics Products and Elias Brothers cases are square authority for, and strongly support, Respondent's position. In each of these three cases, the Board found violations of Section 8(a)(1) for reasons of interference, coercion and restraining of Union activities, but also found that these employers had violated Section 8(a)(3) on the grounds that employees were discriminatorily discharged for union activities. These findings were based solely upon the uncorroborated testimony of the purposed discriminatees to the complete exclusion of all of the evidence of the witnesses for the employers. The Court of Appeals for the Sixth Circuit in the Elias case succinctly summarized the situation in both the cited cases and in the cause now before this Court by stating that "* * * the Trial Examiner has credited the testimony of a highly prejudiced

and interested witness and discredited the testimony of all witnesses to the contrary". Enforcement was denied in these cases, as it should be herein, for lack of substantial evidence to support the order of the Board.

The Court of Appeals for the Fifth Circuit, in N.L.R.B. v. Borden Co. (1968), ____ F. 2d _____, 67 LRRM 2677, also recently refused to enforce an 8(a)(3) order of the Board that was based entirely upon testimony of the discharged employee. This Court held that:

> "The only facts in the record supporting anti-unionism as a motivating factor in Vasquez's discharge are related by Vasquez himself; 'the beginning and the end of the thread, and everything between, are supported by testimony of no one else.' N.L.R.B. v. Texas Industries, Inc., No. 24255, Dec. 28, 1967, at p. 5, 67 LRRM 2114. Many of these facts are not uncontradicted. Thus, while 'the initial choice between two equally conflicting inferences of discriminatory or non-discriminatory employer motivation for an employee discharge is primarily the province of the Board,' 'the reviewing court must not confine itself to the consideration of evidence "which when viewed in isolation", supports the Board's findings, but must also take "into account contradictory evidence or evidence from which conflicting inferences could

be drawn." . . . "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . .'"

The clear preponderance of the evidence in this record sustains the position of Respondent that it did not commit an unfair labor practice insofar as the employment of Dulce Fumero is concerned. Nevertheless, the Board, credited the uncorroborated testimony of Fumero; discredited Respondent's witnesses; and drew inferences of unlawful motivation which were totally unreasonable and significantly unsupported by any evidence in the record. These matters will be discussed in the succeeding sections of this brief.

B. The Board Failed To Apply Proper, Legal Standards In Its Evaluation Of The Credibility Of Respondent's Witnesses.

The Board discredited the testimony of Respondent's witnesses upon the grounds that they were guilty of evasion, exaggeration, self-contradiction and of interest in the proceedings. In no instance was the testimony seized upon by the Board as evidence of lack of credibility, testimony which was being given upon the principal issue in the case. To the contrary, the inconsistencies in the testimony of the witnesses were minor and related primarily to peripheral matters. A trial judge does not have to believe a witness if there is reasonable cause not to believe him, but a court may not arbitrarily reject the testimony of a witness whose testimony appears credible. (Gee Chee On v. Brownell, 253

F. 2d 814; Yip Mie Jork v. Dulles, 237 F. 2d 383).

The Board, in fact, applied the doctrine of "falsus in uno, falsus in omnibus" to Respondent's witnesses, while specifically rejecting application of the doctrine to the contradictory and exaggerated testimony of Fumero. (R. 31). This harsh rule has "little or no place in modern jurisprudence". (Virginia R.R. Co. v. Armentrout, [CA-4 1948), 166 F. 2d 400, 405 [upon instructions to jury]). The doctrine, "* * * so far as it has any value, ordinarily applies to cases of deliberate falsehood". (New England Electric Sys. v. Securities & Exchange Commission, 346 F. 2d 399, 408 [reversed and remanded on other grounds, 384 U.S. 176, 86 S. Ct. 1397]).

The testimony of Respondent's witnesses, which gave rise to the Board's findings of lack of credibility, has been extensively reviewed in the preceding section of this brief. It is quite clear that the subject matters of the testimony involved in these findings were peripheral and without direct significance or bearing upon the principal issue in the case. It is even more clear that not one of Respondent's witnesses was or could have been charged by the Board with willful or deliberate falsehoods upon a material issue.

The alleged bias and lack of candor, asserted to have characterized Mary Pina, is an excellent example of these findings by the Board. Pina had been examined extensively

on both direct and cross examinations with reference only to the subject of Fumero's work performance upon the spoiled garments. (See Tr. 173-188). The matter of her recognition of the Union organizer was a sudden interjection of an entirely new and different subject matter and was patently an obvious attempt by the General Counsel to confuse the witness for the purposes of impeachment. It is apparent that Pina had had an unpleasant experience with the organizer more than seven months before the date of the hearing, and insofar as the record shows, this was the only occasion upon which Pina had met this individual. Her hestiation in answering is thoroughly explainable, and her testimony reflects no more than ordinary human reactions in a situation of this kind.

In the case of Sherley Thompson, the Board contended that her testimony was attended by self-contradiction, because she allegedly first testified that she was familiar with Fumero's machine stitch and recognized it, and then altered course and claimed that she did not know which of the operators had done the work. Respondent's review of the testimony in question in the preceding section of this brief flatly refutes the contention of the Board. At no time, on her direct or cross examination, did Thompson testify that she was familiar with the stitch of Fumero's machine and recognized it as Fumero's when she saw the defective work. Her testimony was that the stitch was

recognizable, but she did not know which girl's machine was involved.

Thompson was also charged with contradictions in her testimony at the time of the hearing and a pre-trial statement. In the pre-trial statement, Thompson stated, in effect, that she knew Fumero's work because each stitch is different, because the operator's clock number is on the bundle and because each girl ties the bundle differently. This compound sentence is not in contradiction to her testimony, for the reason that it covers, in a single sentence, a number of separate subjects which were explained in the testimony. She did not state that she recognized the work as Fumero's from the stitch alone. Considering the manner in which these pre-trial statements are obtained by Board agents, apparent contradictions of this type will necessarily arise and are of no significance. The same is true of the alleged contradiction between Thompson's testimony that she complained to Hazel Smith and her pre-trial statement in which she stated she complained to Yoshida. Her other testimony was that on such occasions the procedure was to complain to the supervisor in the department who would then call the plant manager. Again, it must be considered that the witness' reference in her pre-trial statement was her understanding that her complaint was really to Yoshida, even though such a complaint had to go first to Smith.

Another witness charged with self-contradiction,

coupled with exaggeration, was David Young. Fundamentally, the contention of the Board was that in the course of his examination he substantially expanded the number of times that Fumero requested a layoff, and that his testimony was contradicted by his pre-trial statement. A fair reading of the transcript reveals neither self-contradiction nor exaggeration in Young's testimony. In his direct examination, he testified that Fumero asked him on more than one occasion for a layoff. Counsel for Respondent examined him in detail as to only three of the conversations and then dropped the subject. For the first time, on cross-examination, he was specifically asked for the number of conversations, and he responded that he thought it was at least a half dozen times. The sentence in the pre-trial statement seized upon by the Board as evidence of lack of credibility was a portion of the witnesses' testimony concerning Fumero's request for a layoff at the time that the company was considering the swim suit business for the summer. Young described this episode in detail and then stated that Fumero asked him twice about being laid off. In the context of the statement, it is quite evident that the witness was not relating the total number of times overall that he could recall Fumero's request for a layoff, but was simply stating that on that particular occasion she asked him twice.

The Board also contended that Young gratuitously

injected the statement into his testimony that Fumero spoke English well, in the hope of discrediting him. This was based upon a finding of the Trial Examiner that Fumero did not speak English. No mention was made by the Board of the fact that Sanchez also testified that Fumero could speak English well except when she was excited. (Tr. 321). Neither did the Board see fit to comment upon the fact that no extensive effort was made at the hearing to actually determine how much or how little English Fumero actually spoke and understood. The few questions asked by the Trial Examiner (Tr. 10) were hardly sufficient for the broad finding that Fumero could not understand English and to contend that Young was an incredible witness for the mere reason that he mentioned this fact.

Little need be said about the Board's rejection of the evidence of Geneveva Sanchez as "exaggerated". Sanchez had testified that Fumero asked her many times for a layoff, as much as five times in one day. Without the benefit of any substantially conflicting evidence, other than Fumero's general denial, the Board discredited Sanchez upon its unsupported contention that it was implausible to think that Fumero would have made such statements to Sanchez.

Yoshida was discredited as an evasive witness primarily by reason of the Board's rejection of his version of his conversation with Yanez. The statement relied upon by the Board that he did not know whether Fumero brought up the

subject of the Union or whether he brought it up is quite plainly as much an admission that he did raise the subject as a contention that Yanez raised it. Far from being an evasion, it constitutes only a simple statement that the witness did not remember at the time of the hearing. The Board also contends that Yoshida was evasive and failed to explain his unwillingness to speak to Yanez at her machine, but the flat answer to that contention is that he was never asked, either directly or indirectly.

Finally, although the Board gives no more weight to the testimony of Hazel Smith than it did to the other five witnesses appearing on behalf of Respondent, Smith was not directly charged with the lack of credibility other than a comment that she had an interest in the proceeding. These labored findings of lack of credibility attributed by the Board to Respondent's witnesses should not be sustained by this Court. "While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be given when evaluating the evidence on the record as a whole". (Portable Electric Tools, Inc. v. N.L.R.B. [CA-7 1952], 309 F. 2d 423, 426). The Portable Electric Tools case involved the same considerations and issues now before this Court, for the reason that the Trial Examiner and the Board in that case based their findings of violations of the Act upon

reliance exclusively upon the testimony of the charging party and by denying credibility to the testimony of the "many witnesses" called by the company.

Similarly, in N.L.R.B. v. Denton (CA-5 1954), 217 F. 2d 567, the Fifth Circuit refused to enforce an order of the Board requiring re-instatement of an employee, whom the Board found to have been discriminatorily discharged, upon the grounds that the Board had "* * * inadvertently attached undue emphasis to the testimony as to his conceded pro-union status, while minimizing other substantial evidence of his admitted derelictions * * *" given by the witnesses for the employer. (217 F. 2d 567, 570-571). See also: Farmers Co-Operative Co. v. N.L.R.B. (CA-8 1953), 208 F. 2d 296, and Victor Products Corp. v. N.L.R.B. (CA-DC 1953), 208 F. 2d 834.

The Board applied inconsistent standards in its evaluation of the testimony of Dulce Fumero, as opposed to its evaludation of the testimony of Respondent's witnesses. This "dual" standard is readily apparent by reference both to the Board's decision and to Fumero's testimony at the hearing. In the words of the Trial Examiner, affirmed by the Board, "* * * Fumero's interest (as an alleged discriminatee) is obvious, * * * and in addition, she appeared to me, even through the barrier of language, to be given to emotional attitudes somewhat more readily than the average person, leaving me with the impression at times that her

feelings colored her concepts of what had been said or done. Moreover, I have at least some doubt that her grasp of English was always sufficient to absorb or repeat accurately what she claims to have heard". (R. 31). Again, with regard to Fumero's claims of repeated statements by Management on the subject of contract work (R. 32), the Examiner was left with "* * * a substantial question whether some or all of her portrayal reflects assumptions she makes as to arguments the Company would advance in a debate over unionization".

Nevertheless, despite its own findings of flaws and fallibility in Fumero's competence to accurately portray what she had seen and heard and despite the fact that, with even less provocation, the Trial Examiner and the Board discredited all of the testimony of Respondent's witnesses, the Board gave full credence to Fumero's version of her last days of employment.

Adopting the Board's views upon the credibility of Respondent's witnesses, Fumero's own contradictions and exaggerations should have cast an equal cloud upon her credibility. Fumero, in her testimony, it will be recalled, denied not only telling Young that she wanted a layoff while her children were out of school but, in what amounted to a blanket denial, denied that she had mentioned a layoff to any supervisor, except upon her last day at work (Tr. 362). The Board, however, entirely overlooked her

contradictory testimony on direct examination that in response to Young's alleged threat of a layoff if the Union succeeded, she asked: "* * * why wait until there is a slack off, why not just lay me off now". (Tr. 24). Fumero was also guilty of the same exaggerations in her testimony that the Board held against Respondent's witnesses, Young and Sanchez. For example, she was asked if Young had ever mentioned Olga and Cole, two other garment manufacturers. She first replied, "Three or four times". Then Fumero contended that this subject was mentioned to her "Once a week or every two or three days. * * * From the time that I had the meeting at my house until the day before the elections". (Tr. 28-29). Similarly, in her rebuttal testimony, Fumero denied calling Hazel Smith a profane name by testifying that "Never have I spoken with her anything other than work, or anything have to do with work". (Tr. 363). On cross-examination, Fumero, upon being asked if Hazel Smith had given her a bed, indulged first in an angry and indignant outburst, "We are not here to bring out all of the little things that have been going on. If I were to mention the things I have given her, we'd be here the rest of the night and even more. If we could concentrate on what the problem is here." (Tr. 365). Following an admonition by the Trial Examiner, she then admitted that she had bought a headboard from Smith (Tr. 365), which would indeed imply that she had had conversations with Smith concerning

matters other than her work.

From this entire record, it is impossible to sustain the Board's conclusion that Fumero was the more credible witness. In fact, a fair reading of her testimony must lead to the conclusion that she was the least credible witness in the whole proceeding.

C. The Board's Findings Against Respondent Were Based Upon Inferences Which Were Unsupported By The Evidence And Which Were Speculative And Conjectural.

In order to support its ultimate Findings of Fact that Fumero's work was not deficient and that Respondent engaged in a deliberate plan to find unwarranted fault with Fumero's work with the aim of humiliating her and inducing her to quit her employment, the Board drew inferences and conclusions which were either wholly unsupported by any evidence or which amounted to sheer speculation and conjecture. In some instances, the inferences drawn were not reasonable choices of the possible inferences raised by the facts.

The Board concluded that it defied "rational belief" that Fumero, whom the Board inferred was dependent upon her earnings for her support and the support of her children, would deliberately seek discharge to secure reduced, temporary income from unemployment compensation. (R. 41). There is not a line or a word of evidence in the entire record from which this inference can be drawn. The Board had utterly no knowledge of whether Fumero was wealthy or

poor, whether she was moderately well off or totally dependent upon her earnings. Neither did the Board have evidence whether Fumero was married and well-supported by her husband or widowed and the sole support of the family. As a matter of fact, the uncontradicted evidence in the record would sustain only the opposite inference: that Fumero was indeed not dependent upon her earnings. Not only is the record replete with evidence that Fumero had on more than one occasion, requested a layoff while her children were out of school, but the uncontradicted evidence also is that she was on a leave of absence from July 18th through October 17th, 1964, and, again, from October 2nd through October 30th, 1965. (Tr. 289; 305). Fumero herself testified that, when Young allegedly told her that she would be laid off when the season "slacked off", she suggested that he not wait but "* * * just lay me off now". (Tr. 24). Moreover, there is no evidence to support the Board's finding that it was implausible to believe that Fumero would resort to the self-defeating dodge of deliberate misconduct which would deprive her of unemployment benefits. It cannot be said from the evidence of Respondent's witnesses that Fumero was seeking a discharge, for, to the contrary, it is clear that she wanted a "layoff". Her insistence to Young that she was doing the best she could and her own admission that she asked Yoshida "* * * to take me out of the plant with a document -- to give me a layoff with a document so that I

could work elsewhere." (Tr. 38), is evidence that Fumero was not seeking discharge, but was seeking a layoff which would have guaranteed unemployment benefits. It also should be noted that although "willful misconduct" under California Unemployment Insurance Code Section 1256 constitutes grounds for denial of unemployment benefits, the definition of willful misconduct, adopted by the Courts of the State of California, requires such a high degree of proof of deliberate and willful acts purposely engaged in against the best interests of the employer, that it is extremely difficult to establish this ground of disqualification upon the basis of an employee's work performance. (Maywood Glass Co. v. Stewart, 170 C. A. 2d 719).

Another conclusion drawn by the Board was that it would be a "manifest absurdity" to claim that Fumero's deficient work was a result of sudden incompetence. (R. 41). In other words, upon the uncontradicted evidence that Fumero had been a good operator prior to this period of time, the Board simply decided that it was not possible for her work performance to suffer the sudden and drastic decline shown by the evidence. There is no rational basis for this assumption by the Board. The fact is that capable employees of many years' standing do, for various reasons, quite suddenly commence performing inferior work. This unfortunate human propensity on the part of employees has been the subject of a great many cases in arbitration under union contracts. The

Board itself has been reminded of this fact by the Courts of Appeal. The Court, in N.L.R.B. v. Plastics Products (CA-6), supra, noted that the discriminatee had been employed for five years and that "at one time he had been a satisfactory employee, but had become increasingly unreliable and insubordinate * * *". Again, from the opinion in the Farmers Co-Operative case, supra, the employee there involved "* * * seemed to get along very well for a time and then things became unsatisfactory". (208 F. 2d 296, 300). The inference drawn by the Board that Fumero could not have become suddenly incompetent was not only unsupported by the evidence, it was quite contrary to ordinary human experience and cannot be sustained.

As we have said before in this brief, the primary issue before the Board was whether Fumero did damage Respondent's garments. Justice would appear to compel something more than determination of this issue by an inference that it is manifestly absurd to believe that an employee's work suddenly became deficient or that the employee would not in any event have sought discharge or layoff because she was dependent upon her earnings. This, however, is precisely the approach taken by the Board in this case. It refuted, o the grounds of manifest absurdity, the entire premise that Fumero's work became deficient and rejected, on the grounds of implausibility, that she deliberately courted dismissal. Thus, the Board claimed that there remained only the final inference

that her work was not deficient and that Respondent was merely engaged in faultfinding. (R. 43).

It is axiomatic that if several possible inferences may be reasonably drawn from the evidence, the trier of fact must consider and give equal weight to all of the possible inferences. There is a further, far more plausible inference that should have been drawn from Fumero's own testimony. Fumero testified that she was "* * * very sick from nerves" (Tr. 53; 362); and that this ailment commenced at the time of the first Union meeting at her home. (Tr. 53). Throughout her testimony, Fumero made repeated reference to her extreme case of nerves, her poor circulation and to the fact that she saw her doctor weekly. It is obvious that she was badly disturbed by her health. This admitted evidence of progressive illness, when considered with Respondent's evidence of the decline in the quality of her work, leads directly to the only rational conclusion upon the evidence that Fumero's poor work performance was attributable directly to her nervous and mental condition, which required constant treatment by a doctor. Yet, this possible conclusion, and, certainly, reasonable inference from Fumero's own evidence was never considered or discussed by the Board.

The Board also argues that an inference should be drawn against Respondent because, assuming Fumero's work was deficient, it was difficult to understand why she was not discharged. Considering the hazards of N.L.R.B. action on

behalf of discharged union adherents and considering the complaint issued in the present case, it is most easy to understand why Respondent did not discharge Fumero, and difficult to understand the Board's reasoning in assigning this fact as an inference against Respondent.

A finding cannot rest merely upon guess, suspicion or speculation predicated upon inferences arising from widely separated and inconsequential incidents. Particularly is this so when inferences are utilized to overcome direct and positive testimony. (N.L.R.B. v. Mallory & Co. (CA-7 1956), 237 F. 2d 443). An inference cannot stand in the face of established or admitted facts or in the face of another inference equally reasonable. (Commercial Standard Insurance Co. v. Gordon's Transports, Inc. [CA-6 1946], 154 F. 2d 390). "While a satisfactory conclusion may be reached through an inference from established facts, there must still be facts proved from which the inference can be drawn. No inference of fact can be drawn from a premise which is wholly uncertain". (Kenney v. Washington Properties, 128 F. 2d 612, 615).

Although the Court may not disturb the Board's choice between equally conflicting inferences, the Court is empowered to displace the Board's initial choice where there is no substantial evidence on the record considered as a whole to support the inference drawn by the Board as "reasonable". (N.L.R.B. v. Coates & Clark, (CA-6 1956), 231

F. 2d 567); and N.L.R.B. v. Sunset Minerals, Inc., supra.

The approach adopted by the Board in drawing inferences from the evidence was contrary to the principles of legal reason which must guide any trier of fact. Not only did the Board draw inferences which were unsupported by evidence and inferences which were wholly speculative, the Board also reached certain conclusions by adopting inferences from certain selected portions of the testimony of witnesses, while ignoring other testimony on the same subject and even in the same answer. As argued hereinabove, the Board adopted the unsupported inference that Fumero needed employment and would not jeopardize it by poor work and speculated that it was absurd to believe that she would become suddenly incompetent. Therefore, the Board reasoned that her work was not deficient and that Respondent engaged in unjustifiable faultfinding. For further support of this unwarranted conclusion, the Board then drew the inference that she was subjected to "needlessly close inspection" for the purpose of humiliating her (R. 43).

Pina, Yoshida and Smith each testified that the supervisors routinely checked the work of all of the girls on a daily basis and that the inspection of Fumero was similar (Tr. 179; 185; 282; 284; 354-355). Sanchez checked some of the swim suits but was mostly involved in checking the robes. She testified that she had her own department in which she was checking her girls but would leave everything and go

down to check Fumero's work (Tr. 310). She did not allow her to pile up too much work, and when Fumero finished a bundle, Sanchez would check each garment. Sanchez checked for about a week, because she had her own work (Tr. 312-313). After five to eight days on the robes, Sanchez stopped inspecting because Fumero was again performing her work satisfactorily (Tr. 329). The Board, however, found that the faultfinding lasted until the end of Fumero's employment (R. 38) and was a special procedure aimed at humiliating Fumero. It reached this inference by referring to the testimony of Sanchez that she would check every garment in the bundle, but ignoring the other evidence of Sanchez that she was also engaged in checking her own department and, thus, was not standing over Fumero constantly. The Board then claims that the faultfinding lasted until the end of Fumero's employment, contrary to the evidence of Respondent's witnesses, by contending that Yoshida's testimony that Fumero's sewing on the robes was defective on sixty to seventy percent of them, necessarily raised the inference that this procedure was followed to the end of her employment. Quite plainly, when a witness is only asked what percentage of garments were damaged, his answer raises no inference as to the period of time in which the damage was done. If the Board had credited the complete testimony of Sanchez on this point, rather than selected portions thereof, and had properly credited Yoshida's answer for the purpose

for which it was given, the Board simply could not have reached the conclusion that Fumero was subjected to a needlessly close inspection procedure.

This Court is not bound by the inferences drawn by the Board or the conclusions of ultimate facts based upon such inferences. Insofar as "the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, * * * or the interpretation of the legal significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so-called "clearly erroneous" rule.'" (Galena Oaks Corp. v. Scofield, 218 F. 2d 217, 219). The Court of Appeals for the Seventh Circuit in the Portable Electric Tools case, supra, succinctly summarized the extent of Appellate review of such Board orders:

> "The fact that a solid basis for the discharge of Mrs. Ballard for cause exists would not, standing alone, prevent the Board from finding that her discharge was motivated by her union activity--provided there is substantial evidence in the record considered as a whole to support such a finding. Osceola County Co-Op. Creamery Ass'n. v. N.L.R.B., 251 F. 2d 62, 41 LRRM 2289 (8th Cir. 1958). If this Court, however, is not to be 'merely the judicial echo of the Board's conclusion' then its determination must 'be set aside when the record . . . clearly precludes the Board's decision from being

justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both . . . The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.' Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 27 LRRM 2373. While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be given when evaluating the evidence on the record as a whole.

"The Board argues the discriminatory nature of Mrs. Ballard's discharge as though the burden was upon the petitioner to exonerate itself of the charges made against it. The burden, however, is on the Board to show affirmatively by substantial evidence that the discharge was discriminatory and motivated by Mrs. Ballard's alleged union activities." (309 F. 2d 423, 426).

When measured by the standards or requirements under the substantial evidence rule which have been imposed by the decisions of the various Courts of Appeal cited herein, the Board's findings that Respondent discriminated against Dulce Fumero are clearly erroneous.

The Board in the concluding paragraph of its brief (p. 15) cites five cases in support of its Petition for Enforcement. It is true that these cases involve Board orders holding the employers therein in violation of Section 8(a)(3) of the Act by reason of the Board's findings that they had constructively discharged or otherwise discriminated against union adherents and, thus, bear some resemblance to the proceeding herein. However, as authority for enforcement of the Board's order against Respondent, these cases must be deemed to be superficial authority at best.

The Saxe-Glassman (201 F. 2d 238), Tennessee Packers (339 F. 2d 203), and Vacuum Platers (374 F. 2d 866) cases stand for the proposition that a constructive discharge, which is caused by discriminatory acts on the part of the employer, is a violation of Section 8(a)(3) of the Act, just as though the employer had directly terminated the employee involved. Respondent does not quarrel with this proposition standing alone, but, as is apparent from its brief, Respondent's dispute with the Board concerns the substantiality of the evidence underlying the Board's order. The Courts of Appeal in each of these three cases enforced the Board's orders upon their conclusion that the orders were in fact supported by substantial evidence.

The Bausch & Lomb case (217 F. 2d 575) involved pervasive anti-union tactics on the part of the company culminating in several discriminatory discharges, demotions and

failures to re-employ after layoff. The evidence was conflicting, and, in the case of the discriminatorily laid-off employee, a finding had to be made whether the employee did or did not have the skill to perform the remaining available work. The Court of Appeals for the Second Circuit enforced the Board's order, under the substantial evidence rule, and accorded due weight to the special competence of the Trial Examiner and the Board to draw the inference of discrimination; however, it is significant that in the text of its opinion the Court observed:

> "It is to be noted that the trial examiner exercised care and discrimination in making his findings and recommendations and that he refused to find unfair labor practices in the separation of 41 additional employees named in the General Counsel's complaint".

Had the Trial Examiner and the Board exhibited the degree of care and discrimination in this case that was sustained by the Courts in the cited cases, Respondent cannot but conclude that the 8(a)(3) findings, which are now in dispute, would never have been lodged against Respondent in the first instance. The Monroe Auto Equipment case (67 LRRM 2973) was also based upon discriminatory constructive discharges. The Court of Appeals for the Fifth Circuit found that the evidence was "not as strong" as in other cases but the Court was unable to say that the findings therein were not supported by substantial evidence. The Court also

noted the rule, as has been cited to the Court herein, that the Courts of Appeal may decline to follow the findings on credibility of the Board and are not barred from setting aside a decision if the Court cannot conscientiously find that the evidence in support thereof is substantial. Finally, the Fifth Circuit held that it was not at liberty to displace the Board's choice between two fairly conflicting views of the evidence.

These cases in no way detract from Respondent's position herein. The question of compliance by the Board with the requirements of the substantial evidence rule must obviously be determined on a case-to-case basis, and it is Respondent's position that in this instance the Board's order should not be enforced.

VI

CONCLUSION

The Board's findings that Respondent harassed and humiliated Fumero into leaving her employment and that it subsequently refused to re-employ her because of an unlawful motive to get rid of her in punishment for her union activities are not supported by the record. The clear weight of the evidence establishes the fact that Respondent patiently tolerated a substantial amount of costly damage to its product at her hands. And, upon a fair review of all of the evidence, Fumero cannot be found to have genuinely sought re-employment. The fact is, the question of what did happen upon her return to Respondent in June, 1966, is immaterial, for even if the evidence be deemed to support Fumero's version of the events, there can be no doubt that Respondent had ample justification for refusing to rehire her.

Respondent's witnesses were unjustly and improperly found to lack credibility; the inferences drawn by the Board were unsupported by evidence and were speculative and conjectural; and the Board improperly credited all of the uncorroborated testimony of Fumero in order to reach its conclusion that Respondent had violated Sections 8(a)(1) and (3) of the Act. Respondent respectfully submits that the

Board's petition for enforcement herein should be denied.

June 6, 1968

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Attorneys for Respondent.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM B. IRVIN

No. 22544

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL-CIO,
Intervenor.

INTERVENOR'S BRIEF IN OPPOSITION TO PETITION.

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INTERVENOR'S BRIEF IN OPPOSITION TO PETITION.

Jurisdictional Statement.

The Intervenor concurs in the statement at this juncture in the Petitioner's Opening Brief.

The motion of the Intervenor for leave to intervene was granted by the Court on April 2, 1968.

I.
STATEMENT OF THE CASE.

The Intervenor hereby adopts the recitations of the Petitioner (hereinafter referred to as Appellant) only to the extent that they are consistent with the exceptions notd in Appendix A attached hereto.

That is, since the principal issue we wish to argue is the application of the rule relegate the secondary issue of its exceptions to in *NLRB v. United Insurance Co. of America* (U.S. Sup. Court [1968]; 19 L. Ed. 2d 66; 67 LRRM 2649), the Intervenor has chosen to set forth its exceptions to the Appellant's statements of "fact" the summary set out in Appendix A to this Brief.

The extension granted by the Court to the Board for the filing of briefs in opposition to the Petition until July 10, 1968, we assume applies to the Intervenor, as well.

II.
ARGUMENT.

The District Court Should Not Reverse the Order of the Board.

A. The Issue Is Whether the Board's Order Is Supportable.

In *NLRB v. United States Insurance Co. of America* (U.S. Sup. Court [1968]; 19 L. Ed. 2d 66; 67 LRRM 2649), wherein the issue was whether the Board's determination that insurance agents of the employer were "employees" rather than "independent contractors", the Supreme Court stated:

> "Here the least that can be said for the Board's Decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's Order. It was error to refuse to do so."

The issue here, therefore, is not whether the Court, *de novo;* might reach a different conclusion than that expressed in the Order of the Board appealed from, but, rather whether the conclusion of the Board, made after

a hearing with witnesses and oral argument and on the basis of written briefs, is supportable on the basis of the common law of agency. Although the Appellant has in its Brief chosen to assume that an *1893* case (*Casement v. Brown* [148 U.S. 615, 13 Sup. Court 672, 37 L. Ed. 582]) is relevant to the issue presented to the Court herein, the true issue is as stated in the *1968* case of *NLRB v. United Insurance Co.*

In that which follows, therefore, our argument will be directed to the point that the Board's conclusion that Vance *vis-a-vis* his relationship with his employer, Webb and Lipow, was an employee, rather than an "independent-contractor" is supportable as a matter of the common law of agency.

B. Vance Was an Employee of Webb and Lipow, Not an Independent Contractor.

The Board notes, "Vance's work, removing and spreading the dirt resulting from a drilling operation, was . . . limited by the instructions he received the first day on the job." It states that he was "hourly paid and engaged to perform duties that could have been assigned to acknowledged employees of the contractors." Further that in "the context of the work to be performed, supervision exercised over Vance . . . would appear to be no less than would be exercised over acknowledged employees of the . . . contractors."

The Trial Examiner correctly noted that the foreman on the Webb and Lipow job on which Vance was employed did the hiring and firing and was "top authority" on the jobsite. He states, "Vance was retained to use his skip loader and take away the dirt from the holes and to spread it."; that "he was told to keep ahead of the drills and spread the dirt".

The Board did not agree with the Trial Examiner's "interpretation of the facts as to the control over the means utilized" or his *failure to take into account the nature of the work involved.* And there it is: in reaching its Decision and Order the Board took into account facts which its Trial Examiner did not, although such facts are indisputed in the record. We must infer that the Board did take into account the following facts:

(1) Neither Vance nor Watson possess the license required of an excavating contractor under Section 7026 of the Business and Professions Code of the State of California. Therefore, were they not "employees", as found by the Board, (*i.e.,* were they not within the exemption of Section 7053 of that Code) not only would their "contracting" activities constitute a misdemeanor under Section 7028, but, under Section 7031, they would be unable to maintain an action on their "contracts". See *Lewis & Queen v. N. M. Ball Sons,* (1957) 48 Cal. 2d 141; *People v. Rogers,* (1954) 124 Cal. App. 2d Supp. 853. *Cf. Borello v. Eichler Homes, Inc.,* (1963) 221 Cal. App. 2d 487 [cert. den.]; *Johnson v. Silver,* (1958) 161 Cal. App. 2d Supp. 853.

(2) Vance and Watson were employed on construction projects. Such work *must* be coordinated with the work being performed by other employees. Further, the owner, or contracting authority does not look to Vance and Watson for compliance with the specifications of the project; the employers of Vance, and Watson—licensed contractors—are accountable for the progress and satisfactory completion of the job. That is why the employers of Vance and Watson have on-the-job supervisors maintaining a constant control over, and

direction of their work. That is why Vance and Watson have the same starting and quitting times and the same lunch periods as other employees.

In the *Construction Building Material, etc., Local 83* case (1333 NLRB 1144) cited by the Board in the instant matter, the Board noted that it was necessary that the drivers "operate in tandem formation and maintain this steady pattern of unloading (at the construction jobsite)." That neither of the alleged "independent contractors" could "vary from this pattern nor could either, by the exercise of independent skill or judgment, increase his profits by additional hauling."

Similarly, Vance could not increase his earnings by starting early, by working late, or by working at any time other than when the dirt brought up the drills operated by other employees was there for him to spread away from the holes. He could not take the dirt away before the drill brought it up, and he was required to spread it as it was brought up in order to keep it from interfering with the progress of the project.

In *Chapman v. Edwards,* (1933) 133 Cal. App. 72, the Court took cognizance of the integrated nature of a construction project, stating:

> "Where some 15 trucks and drivers are engaged in the same labor to a common purpose and working together at all times, it would tend to disorganization rather than toward system to deem that one was an independent contractor merely because he owned the truck he drove. If this particular one were independent, there surely must be some way through which he could manifest his independence."

We submit that the only way in which Vance and Watson could manifest their "independence" would have been by quitting their employment.

(3) Both Vance and Watson were free of any contractual obligation to continue to work for the employers. Their employers were free to terminate the services of Vance and Watson at any time.

Vance and Watson were paid at an hourly rate, and billed their employers on a daily basis. They did not contract to be paid at so much per yard, and there was no contract that they would perform all of the work of the nature performed by them which the projects required.

As the Court stated in *Chapman*, "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so."

C. The Appellant's Argument Is Without Merit.

(1) *Right of Control Is the Test.*

Although citing no authority, the Appellant argues (p. 10, ¶2) that a finding of independent contractor status cannot rest on strict "right of control". Yet in the *Steinberg* case cited by the Appellant (p. 15) the Court states (p. 857) "It is the right and not the exercise of control which is the determining element". The very same test is expressed in the Appellant's quotation (p. 16) from the *Radio City Music Hall* case: "The test lies in the degree to which the principal *may* intervene to control the details of the agent's performance . . ." (emphasis supplied).

Therefore, the Appellant's reliance on the circumstance that Vance and Watson were sufficiently skilled in the performance of the tasks assigned them that they did not require repeated instructions from their supervisors is fallacious.

(2) *Vance's Relationship to Webb and Lipow Is the Issue.*

Although recognizing (p. 16), that "every case must be determined upon its own facts", the Appellant argues that because Vance, in connection with some job other than the Webb and Lipow project here involved, proceeded with a wage claim as though he were a licensed contractor, rather than an employee, that fact implies that in *this* case Vance was not an employee. (This argument appears at p. 15 of the Appellant's Brief. After quoting the cross-examination of Vance, the Appellant states that it has significance with reference to Watson. No explanation of this transference is proffered by the Appellant.)

We submit that it is the relationship between Vance and Watson and their employers on the two projects here involved that is material; that their relationships to other persons (referred to at pp. 12 and 13) of Appellant's brief are not material.

(3) *Being Factually Dissimilar, the Authorities Cited by Appellant Are Unpersuasive.*

The Appellant parenthetically notes in the cases cited at pages 16 and 17 the type of work performed by some of the persons involved therein. In the *Illinois Tri-Seal Products* case, where such information was *not* given, installers of doors and windows at the homes of

the manufacturers' customers were involved. The *Steinberg* case involved fur trappers. The 1893 *Casement* case cited by Appellants involved contractors who agreed, in writing, to furnish the material and do the entire work of constructing piers in a river "the said work to be done and completed according to the plan and specification hereto annexed, marked 'A', and subject to the inspection and approval of the said engineer . . .". The Court found that "obviously" the defendants were independent contractors, noting, *inter alia* the following facts: they selected their own servants and employees; their contract was to produce a specified result; the will of the companies was represented only in the result of the work, and not in the means by which it was accomplished.

We submit that none of the cases cited by the Appellant are "strikingly similar" to the instant case, although conceding that there is less similarity in the cases where the nature of the work involved is not mentioned than those in which it is at least suggested. We also note that four (4) of the cases cited by the Appellant do not involve a determination under the National Labor Relations Act, and that we have been unable to discover the "dozens of subsequent Circuit Court Decisions" (pp. 15, 16) in which the language of the *Radio City Music Hall* case has been "quoted with approval".

(4) *The Appellant Has Mistaken the Issue.*

The most egregious fallacy in the Appellant's argument, however, is that which we have commented on previously. *United Insurance Co. v. NLRB,* (CA 7, 1962) 304 F. 2d 86, is *not* the most recent Circuit Court case involving "insurance debit agents." A more recent case involving such employees, decided by the same Court, is *United Insurance Company of America v. NLRB,* (1966) 371 F. 2d 316. In that case, the Court noted (p. 321) the Company's testimony that "in order to meet or avoid the Board's earlier findings . . . it had advertently set about to and had made changes . . . to more clearly reflect the independent contractor status . . .". In 1966, the Court again found that the debit agents were independent contractors. *However,* in 1968 the Supreme Court reversed, stating that the Board had made "a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's Order." *NLRB v. United Insurance Company of America,* 19 L. Ed. 2d 66, 67 LRRM 2649. The issue, therefore, is not whether "Vance and Watson satisfy all of the commonly accepted Court tests for independent contractors" but whether the Board's conclusion that they are employees is supported by the evidence. The Appellant's argument that Vance and Watson satisfy some, or even "all" of the tests for independent contractors is mis-directed.

III.
CONCLUSION.

The determination by the Board, made after a hearing with witnesses and oral argument, and on the basis of written briefs, that Vance and Watson were employees of the contractors on the projects involved is supportable on the basis of the common law of agency. Therefore, since the question is not open for determination *de novo,* this Court should affirm the Order of the Board.

Dated: July 5, 1968.

Respectfully submitted,

BRUNDAGE & HACKLER,
By L. D. MATHEWS, JR.,
Attorneys for Intervenor.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

L. D. MATHEWS, JR.

APPENDIX A.

Exceptions to Appellant's Statement of the Case.

(1) The case involves two (2) charges: 31-CC-80 and 31-CC-89. Case No. 31-CC-80 resulted in a Settlement Agreement approved by all parties. Therefore, absent a finding by the Board that the Intervenor had violated the Act in the manner alleged in the Complaint in Case No. 31-CC-89 the Board would have been required to dismiss the Complaint. That is, if Vance is an employee, or if the Intervenor did not persuade Webb and Lipow to terminate Vance's employment by threats violative of Section 8 (b)(4), then, in either instance, it is immaterial whether Watson is an employee or an independent contractor.

(2) For the reasons just stated, the Intervenor, both at the formal hearing in this matter and in its Brief and Exceptions, strenuously endeavored to persuade the Board that Vance's termination did not result from threats by the Intervenor to shut the job down. Having found that Vance was an employee, the Board did not reach the issue of whether the Intervenor's evidence successfully rebutted the General Counsel's evidence of such threats.

(3) There was no investigation by the General Counsel "sustaining" the charges. The General Counsel has no such power or function.

(4) Appellant states that the Board "affirmed all of the Trial Examiner's findings and conclusions except for those relating to the alleged independent

contractor status of the owner operators, . . . quarreling only with his 'interpretation of the facts as to control over the means utilized or his failure to take into account the nature of the work involved' ". What the Board said was that it had "considered the Trial Examiner's Decision, the Exceptions and Briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the *extent consistent herewith*". (emphasis supplied).

(5) The Appellant states (p. 14), "The record in this case is absolutely devoid of any evidence either of control reserved or control exercised in fact by the contractor." The following is quoted from the official Transcript, p. 39, lines 19-23:

"Q. (By Mr. Mathews) There was no supervision from Carl's Trenching and Digging Company on the job, was there? A. No.

"Trial Examiner: You told Vance what to do, how to do it, and when to do it; is that correct?

"The Witness: Yes."

(Testimony of Fletcher, the supervisor of Vance on the Webb and Lipow job.)

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No. 22544

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OPENING BRIEF OF PETITIONER.

Jurisdictional Statement.

This case is before this court by way of a petition praying that a decision and order of the National Labor Relations Board, herein called the "Board" (reported at 168 NLRB No. 112) be reviewed and set aside in its entirety, and that the court direct the Board to adopt the recommended decision of the Trial Examiner and to take such further proceedings as are appropriate under the National Labor Relations Act as amended, herein called the "Act," [61 Stat. 136 *et seq.* (1947), 29 U.S.C. §141 *et seq.* (1958)]. Petitioner is engaged in, and transacts business in, the State of California, as does the respondent labor Union and the alleged unfair labor practices occurred in the State of California, in the Central District of the United States District Court. This court, therefore, has jurisdiction of this petition by virtue of Section 10(f) of the Act as amended.

I.

STATEMENT OF THE CASE.

A. History of the Case.

As a result of charges filed by petitioner in Case Nos. 31-CC-80 and 31-CC-89 on June 23 and August 29, 1966, and an investigation by the General Counsel of the Board sustaining such charges, on October 27, 1966, the General Counsel issued an order consolidating said cases and the consolidated complaint and notice of hearing herein. The charges [Tr. Vol. I, pp. 3, 9, 10, 11] and the consolidated complaint [Tr. Vol. I, p. 12] charge the International Union of Operating Engineers, Local Union No. 12, AFL-CIO, herein called the "Union" with unlawful threats, coercion and restraint of certain "self-employed independent owner-operators, and other persons engaged in commerce or in an industry effecting commerce."

Specifically, the Union was charged with engaging in a plan, program and campaign to force or require self-employed independent owner-operators in the Southern California area, including Vance and Watson, to join the Union and to force employers in the building and construction industry in the Southern California area to cease doing business with self-employed owner-operators in said area, including Vance and Watson, all in violation of Section 8(b)(4)(ii)(A) and (B) of the Act.

The hearing before the Trial Examiner was held on February 16 and 17, 1967. Virtually no attempt was made thereat to present evidence in rebuttal to clear evidence of unlawful conduct, the Union raising but a single issue of substance, that of whether the owner-operators, Vance and Watson, were in fact independent contractors or employees. On April 21, 1967, Trial Exam-

iner, E. Don Wilson, sustained all charges against the Union. On December 12, 1967, the Board affirmed all of the Trial Examiner's findings and conclusions except for those relating to the alleged independent contractor status of the owner-operators. On this issue, the Board reversed the Trial Examiner finding that the Union

> "was involved in disputes with the employer relating *to their employees,* and was not, therefore, in violation of Section 8(b)(4)(ii)(A) and (B) of the Act. Accordingly, we shall dismiss the complaint." (Emphasis supplied).

B. The Independent Contractor Status of Vance and Watson.

The Trial Examiner framed the independent contractor issue in the following words:

> "(1) Were Samuel J. Vance and John Watson self-employed persons within the meaning of the Act?" [Tr. Vol. I, p. 31, line 5.]

The findings of the Trial Examiner pertinent to this issue are copied here in full, in view of their importance, and in view of the fact that the Board accepted the Trial Examiner's findings of fact, quarrelling only with his "interpretation of the facts as to control over the means utilized or his failure to take into account the nature of the work involved." [Tr. Vol. I, p. 44, line 17.]

> "B. The facts with respect to the self-employment status of Vance.
>
> "I find that at material times, Vance was a self-employed person.[3] He was in the business of ex-

"3. Disputes with self-employed contractors are as primary in character as if the self employed contractor had others doing the work for him. *Northwestern Construction of Washington, Inc.,* 152 NLRB 975, 980.

cavating and grading, using a skip loader and dump truck in his operations. He owns the skip loader and tractor and when necessary, rents the dump truck by the hour. He pays his own costs, thus, he pays for needed insurance, fuel, repairs, and services on his own equipment and pays for the rental of the dump truck and the fuel therefor, when he uses it. He either solicits work for himself or through the services of a company known as El Monte Equipment Co. He pays El Monte 10% of his earnings for El Monte's services in doing his bookkeeping, providing telephone service, advertising, and parking his equipment. Vance's customers are billed by El Monte and upon payment, El Monte deducts 10% for itself and remits the balance to Vance. During the last year, Vance worked for about 100 customers, including contractors and home owners. He charges and is paid by the hour. No deductions for social security or income tax are made from his compensation. During material times, Vance obtained an excavating and grading job with Webb and Lipow at the C. L. Peck Wilshire Plaza Construction Project. Webb and Lipow was performing the shoring operations on the Project pursuant to a contract with Peck. The shoring required the digging of holes by drills. Vance was retained to use his skip loader and take the dirt away from the holes and to spread it. The only directions he received were on his first day when he was told to keep ahead of the drills and spread the dirt.

"C. The facts with respect to the self-employment status of Watson.

"Watson does grading work. He uses a truck, trailer and skip loader. He owns all of his equipment. He pays the insurance on his equipment. In the past year he has worked for about 75 different persons through self solicitation and job referrals from contractors and friends in the excavating business. Prospective customers reach him through his own phone where he has a telephone answering service for which he pays. While he works principally for contractors he also works for private home owners. He has no employees but is paid for his services and the use of his equipment. Social security or income tax is never deducted from the compensation he receives from customers. He works by the hour for a fee which he sets and changes on occasion. He keeps his own record of the hours he works.[4] Swinerton & Wal-

"4. It must be noted that Respondent considered Watson a self employed person since it required him to sign a collective bargaining agreement with Respondent.

berg Co., Oltmans and Jackson used Watson's services separately and from time to time, to do finished grading work for cement or concrete. A superintendent from each company told him where he was to work and that he was to grade from grade stakes. He first started work on this project through a referral from an excavator.

"D. Conclusions as to the self employment and person status of Vance and Watson.

"I find the facts establish Vance and Watson as independent contractors, or self employed persons. Respondent contends they are employees. The 'right of control' test governs. It is recognized that no one factor is determinative of this issue. The persons for whom Vance and Watson performed work had the right of control only over the end to be achieved and not over the means to be used in reaching such end. Vance and Watson were independent contractors in law and as a matter of economic reality. They were persons and self employed persons. They determined their own profits by what they paid for, or the rate at which they rented, their equipment; they set their own rates of pay; they determined what repairs and services they needed and arranged for the same to be done; they determined what insurance they needed and paid for the same. They were told what they should do but it was substantially left to them as to how they should achieve the ends. They assumed the risks of their businesses. They were to accomplish results or to use care and skill in accomplishing results. The control exercised by the contractors with respect to Vance and Watson was limited to the achievements of a desired result and did not include control of the means. They were self employed persons within the meaning of the Act. I consider it irrelevant that neither possessed a license as a contractor." [Tr. Vol. I, p. 31, line 16.]

II.

SPECIFICATION OF ERRORS RELIED UPON.

The Board erred in the following respects:

1. The Board erred in concluding that Vance and Watson were employees and not independent contractors.

2. The Board erred in concluding that the crucial factor in determining the status of Vance and Watson was the degree of control reserved over the means of performing their work and not the degree of control exercised.

3. The Board erred in concluding that the simple description of the job assignment given Vance and Watson *limited* the manner and means to be used to accomplish the job.

4. The Board erred in finding that Vance and Watson were engaged to perform duties that could have been assigned to acknowledged employees of the contractors.

5. The Board erred in finding that, in the context of the work to be performed, the supervision exercised over Vance and Watson was no less than would be exercised over acknowledged employees of the contractors.

6. The Board erred in finding that the degree of control exercised over Vance and Watson evidenced an employment relationship because of the recurrent dependence of Vance and Watson upon the contractors for future employment.

7. The Board erred in concluding that the respondent union was engaged in disputes with employers regarding employees and that, therefore, the respondent

union's acts did not violate Section 8(b)(4)(ii)(A) and (B) of the National Labor Relations Act.

8. The Board erred in dismissing the complaint of its General Counsel and in not adopting the decision of its Trial Examiner.

III.

SUMMARY OF ARGUMENT.

The position taken by the petitioner in its charges, by the General Counsel of the Board in issuing complaint, and by the Trial Examiner in finding violations of the Act, *i.e.*, that the owner-operators were independent contractors and not employees, is correct.

IV.

ARGUMENT.

A. Vance and Watson Were Independent Contractors and Not Employees.

The Board finding of employee status stems in part from its erroneous statement of the law that "the crucial factor is the degree of control reserved over the means, not the degree of control exercised," [Tr. Vol. I, p. 44, line 22], whereas the control exercised in fact is of vital importance in determining independent contractor status, and especially is this true when, as here, there is no written contract.

The only case cited by the Board in support of its decision, *i.e.*, *Marshall and Haas*, 133 NLRB 1144, establishes not a "right of control," but an "exercise of control" test. In *Marshall and Haas* the contractor hired six drivers, four of whom were admitted employees and two of whom were alleged independent contractors.

However,

> "each [of the six drivers] was required to load his truck in succession at the Yuma plant and drive the mixer to the batch operation at the construction site. There each unloaded in turn and returned to the Yuma plant for reloading. At all times [all six drivers] were subject to the direction and control of one of the Pittmans, one of whom was the owner of Yuma. It was necessary, according to Howard Pittman, that the unloading of the concrete be a continuous operation and six trucks were required for this purpose. It was also necessary, therefore, that the drivers operate in tandem formation and maintain this steady pattern of unloading." (133 N.L.R.B. at 1145)

Despite this circumstance of direct exercise of control in the *Marshall and Haas* case, one Board member dissented from the independent contractor finding in that case, and the majority of two agreed that "the issue [was] close." (133 NLRB 1144, 1146.)

In the case of *NLRB v. Servett, Inc.,* 313 F. 2d 67 (C.A. 9, 1962), this Court refused to enforce a Board order holding that franchised driver-salesmen (who prior to the franchise plan were employees of the company and continued to do the same work) continued in employee status. It should be noted at this point that the Board decision in *Servett* was handed down on September 14, 1961, whereas its decision in *Marshall and Haas, supra* issued *just one month thereafter.* Yet, the Board in the instant case refers only to its decision in *Marshall and Hass* and quite ignores *Servett,* which was denied enforcement by this Court on the independ-

ent contractor issue, and which is much closer to the instant case factually.

The Board decision in *Servett* appears at 133 NLRB 132 (48 LRRM 1596). In *Servett* there was a history of admitted employees status (absent here), a permanence of relationship (absent here), the franchised work was done by the drivers themselves, not by drivers' employees (our factual situation is the same), and a franchise contract which provided for close control over the franchise operation, including for example the employer's right to replace a driver-nominated substitute (absent here).

It is clear that a finding of independent contractor status cannot rest on strict "right of control" as distinguished from control exercised in fact. Indeed, the right of control in *Servett* was clearly expressed in written franchise agreements, whereas here it is not so expressed, but only inferred by the Board solely from the nature of the operation.

The Board here, in effect, states that there simply cannot be an effective independent contractor arrangement because of "the nature of the work [here] involved." This is clear from the following language of the Board decision:

> "When they were hired, both Vance and Watson received their initial instructions from the project superintendent indicating the jobs to be accomplished. *However, the simple descriptions of the job assignment limited the manner and means to be used to accomplish the job.* For example, Watson was instructed to grade a certain area, the boundaries and level of which were marked by stakes. Vance's work, removing and spreading the

> dirt resulting from a drilling operation, was similarly limited by the instructions he received the first day on the job." [Tr. Vol. I, p. 44, line 25. Emphasis supplied.]

We challenge that there is any type of work or operation absolutely anathema to an independent contractor relationship which is otherwise proper. (Obviously, the Board, in writing the quoted paragraph, had fresh in mind the *Marshall and Haas* case), cited immediately thereafter, where six truck drivers, only two of whom were alleged independent contractors, operated in tandem and under the immediate direction of company supervisors.

The Board next finds that both Vance and Watson were "engaged to perform duties that could have been assigned to acknowledged employees of the contractors." The finding is clearly in error, for the contracts with Vance and Watson provided for varying rates, in each case set by Vance and Watson, from $11.00 to $15.00 per hour for the driver, the tractor, the skip-loader, and other necessary equipment as a package. [Tr. Vol. II, pp. 46, 95.] The record is entirely silent with respect to the availability to, or company ownership of, tractors and skip-loaders which might have been used by employees of the company in the operations involved. The functions in question could not have been assigned to employees. As has already been noted, the driver-salesmen in *Servett* had held employee status for many years prior to the establishment of the franchise agreement with said drivers; thus even were the work in question subject to assignment to employees, such a circumstance would not have been decisive.

The Board next holds that

> "in the context of the work to be performed, the supervision exercised over Vance and Watson would appear to be no less than would be exercised over acknowledged employees of the various contractors."

Again, the finding is in error, since it says in effect that there exists a flat rule of law which prohibits the sub-contracting of work of this character. Since this case does not involve written contracts (as in *Servett*, where the Board was able to point to specific items of control *expressly reserved to the employer*, and since there is no direct evidence here of exercise of control in fact), the Board was forced to justify its finding of employee status on the preliminary finding in effect that "there cannot be effective independent contractor status in work of this nature," a proposition obviously unsound.

Next, the Board makes the remarkable observation that

> "the degree of control exercised over the means of operation of Vance and Watson is further evidenced *by their recurrent dependence upon the contractors for future employment* on these and other construction jobs, and the fact that the manner in which they perform will be determinative of future assignments from these contractors."

Such a contention is not only factually unfounded, but is legally ridiculous. The contention is factually unfounded for the reason that the Vance principal in question was one of about one hundred for whom Vance had worked in the past year, and the Watson principal in question was one of approximately seventy-five for

whom Watson had worked in the past year.* [Tr. Vol. II, pp. 44, 62.] As much as 40% of Vance's business was for private home owners or plumbers, outside of the construction industry. Thus, Vance and Watson depended on repeat business only in the sense that any independent contractor so depends, and they were not, as the Board implies, under the implied threat of immediate discharge if they did not behave themselves.

But the conclusion of the Board that "recurrent dependence upon the contractors for future employment" is in any sense evidence of control is outrageous. The efforts of General Motors or General Electric to please their customers are no less nor greater than those of Vance or Watson to please theirs. Yet, General Motors does not become an employee of a customer because he has purchased or may purchase a second or third successive Oldsmobile. This contention of the Board falls heavily of its own weight, and serves to establish the proposition that by its exacting standards there is no independent contracting arrangement in a case of this kind which the Board will recognize as valid.

The Board finding that "Vance and Watson were hourly paid" is not correct in its implication that they worked for wages. The hourly rate referred to (from $11.00 to $15.00) covered driver and specified equipment, and was in no sense a wage. This fact becomes especially clear when we note, in the case of Vance, his ownership of the skip-loader and tractor, his rental of a dump truck when necessary, his payment of all of his own costs including insurance, fuel, repairs, services, parking space, office expenses and cost of

*Indeed Watson worked for three different principals on the dates in question, on occasion for all three on the same day. [Tr. Vol. II, pp. 64, 93.]

soliciting business, including telephone service, and advertising. Thus, what is left from a $15.00 hourly charge for Vance's services and equipment, *i.e.,* his profit, is not a set part thereof, but varied considerably, depending upon Vance's total business during the month involved, and the allocation of the costs to accounts of the dozen or more customers served in the period involved.

B. Vance and Watson Satisfy All of the Commonly Accepted Court Tests for Independent Contractors.

The factual findings of the Trial Examiner, adopted by the Board, establish that in every respect Vance and Watson on the one hand, and the dozens of companies and individuals they dealt with on the other *i.e.,* the principals each behaved as responsible contracting parties. Thus both Vance and Watson were members of appellant Associated Independent Owner-Operators, Inc., an employer association. When faced with collection problems they would proceed in court rather than by way of wage claims before the Labor Commissioner. Their rates were set by themselves (and differed between Vance and Watson) and not by the principal. [Tr. Vol. II, pp. 96, 95, 59.]

The record in this case is absolutely devoid of any evidence either of control reserved or control exercised in fact by the contractor. Yet, even in cases where there is evidence of a certain amount of control, *the courts have repeatedly held that an employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms without thereby converting such independent contractor into an employee.*

Casement v. Brown, 148 U.S. 615, 622, 13 S. Ct. 672, 37 L. Ed. 582;

NLRB v. Steinberg (C.A. 5, 1950), 182 F. 2d 850.

The case of *Illinois Tri-Seal Products v. United States,* 353 F. 2d 216, 230 (U.S. Court of Claims, 1965) specifies an additional reason for finding independent contractor status in that "the parties believed that they were creating a principal-independent contractor relationship and not an employer-employee relationship."

The belief that an effective principal-independent contractor relationship had been created here was shared by both parties, a fact demonstrated dramatically at the hearing in examination of Vance in the following exchange:

> "Q. (On cross-examination, by respondent) Have you ever had to bring a legal action—that is, to collect money that is due you? A. Once.
>
> Q. Did you bring that with the Labor Commissioner? A. No.
>
> Q. How did you do that? A. Through the Glendale courts."

The significance of this testimony is that had Watson considered himself an employee, he would have proceeded with a wage claim through the California Labor Commissioner—where he would incur neither attorney expense or court costs. Since he considered himself an independent businessman, he proceeded with court action. [Tr. Vol. II, p. 96.]

The case of *Radio City Music Hall v. United States,* (C.A. 2, 1943), 135 F. 2d 715, contains the following language which has been quoted with approval in dozens

of subsequent Circuit Court decisions, relating to the extent of control which a principal may exercise over the work of an independent contractor without destroying that relationship:

> "The test lies in the degree to which the principal may intervene to control the details of the agent's performance. . . . In the case at bar, the [principal] did intervene to some degree; but so does a general building contractor intervene in the work of his sub-contractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. *Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees.*" (Emphasis added.)

The courts have repeatedly emphasized the minor reliance to be placed on precedents in determining independent contractor status, and the fact that every case must be determined upon its own facts. However, the following cases (*the first five of which involve Circuit Court refusals of enforcement of National Labor Relations Board orders denying independent contractor status*) are all strikingly similar to the instant case.

National Van Lines v. NLRB (C.A. 7, 1960), 273 F. 2d 402 (involving owner-drivers);

United Insurance Co. v. NLRB (C.A. 7, 1962), 304 F. 2d 86 (involving insurer debit agents);

NLRB v. Servett, Inc. (C.A. 9, 1962), 313 F. 2d 67 (involving driver-salesmen);

Site Oil Co. of Missouri v. NLRB (C.A. 8, 1963), 319 F. 2d 86 (involving gasoline station operators);

NLRB v. A. B. Abell Co. (C.A. 4, 1964), 327 F. 2d 1 (involving newspaper carriers);

Johnson v. Royal Indemnity Co. (C.A. 5, 1953), 206 F. 2d 521 (involving owner-drivers);

Illinois Tri-Seal Products (U.S. Court of Claims, 1965), 353 F. 2d 216.

A reading of the foregoing cases brings the conviction that the facts in the instant case are singularly devoid of circumstances pointing toward an employer-employee relationship.

V.

CONCLUSION.

The Board Erred in Dismissing the Complaint of its General Counsel and in Not Adopting the Decision of Its Trial Examiner.

The charges of petitioner herein were accepted by the General Counsel of the Board as having merit and in turn by the Trial Examiner as having been established at trial. The Board accepted the factual findings of the Trial Examiner in all respects, but dismissed the complaint based upon its disagreement with the Trial Examiner *as to the interpretation placed by him upon such facts*. Thus, the sole issue presented here is whether Vance and Watson were employees or independent contractors at the time of the unfair labor practices complained of; if independent contractors, the appropriate remedy is the setting aside of the decision and

order of the Board in its entirety, directing the Board to adopt the recommended decisions of the Trial Examiner and to take such further proceedings as are appropriate under the Act.

Dated: May 13, 1968.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME SMITH

APPENDIX A.

Pursuant to Rule 18(2)(f) of the Rules of this Court the following exhibits were identified, offered and received in evidence on the trial of this case.

General Counsel's Exhibits

Number	Identified	Offered	Received in Evidence
1(a) through 1(t)	6	6	6
2 and 3	25	neither offered nor received	
4	56	"	
5	68	"	
6	118	"	

Respondent Union's Exhibits

Number	Identified	Offered	Received in Evidence
1	30	30	34
2	146	157	157

APPENDIX B.

The relevant provisions of the National Labor Relations Act, as amended, (29 U.S.C. 151, *et seq.,* 61 Stat. 136, 73 Stat. 519) are as follows:

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

No. 22,544

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATED INDEPENDENT OWNER OPERATORS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,
and
INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 12, AFL-CIO, Intervenor

ON PETITION FOR REVIEW OF A DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THE ISSUE INVOLVED

Whether the Board properly found that the owner-operators are employees rather than independent contractors.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Associated Independent Owner-Operators, Inc., for review of a decision and order of the National Labor Relations Board dismissing a complaint. The decision and order (R. 43-45, 29-36),[1] which issued December 12, 1967, are reported

[1] References designated "R." are to Volume I of the record. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II

at 168 NLRB No. 112. This Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151, *et seq.*),[2] the alleged unfair labor practices having occurred in Los Angeles, California, and vicinity.

The underlying Board proceeding arose following the issuance of an unfair labor practice complaint alleging that the Union[3] had threatened certain contractors in the construction industry with strikes and picketing, with an object of forcing the contractors to cease doing business with two non-union "owner-operators" working on the job site; and of forcing them to join the Union. By this conduct the Union was alleged to have violated Section 8(b)(4)(ii)(A) and (B) of the Act.

The Board dismissed the complaint, finding that the owner-drivers were employees of the contractors involved. The Board reversed the Trial Examiner's finding that the relationship between the contractors and the owner-drivers was that of "independent contractor" within the meaning of Section 2(3) of the Act. As the parties agree, the only issue presently before the Court is whether the Board properly found that the owner-drivers were employees of the contractors. If so, there could have been no "cessation of business" within the meaning of Section 8(b)(4), and no object of forcing a "self-employed person" to join a union, as alleged in the complaint. The facts upon which the Board based its finding of employee status are summarized below:

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of the record. Where a semicolon appears, references preceding are to the Board's finding; those following are to the supporting evidence.

[2] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 13-15.

[3] International Union of Operating Engineers, Local Union No. 12.

I. THE BOARD'S FINDINGS OF FACT

Vance and Watson are owner-operators of light pieces of excavating equipment known as "skip-loaders" (R. 31; Tr. 44, 60). They perform a substantial amount of excavating and other work for various employers in the construction industry.[4] Watson solicits his own work or obtains referrals through friends (R. 31; Tr. 62). Vance finds work himself or through an agent, El Monte Equipment Company, which charges him a 10% commission (R. 31; Tr. 45-46). Both Vance and Watson work at an hourly rate (R. 45; Tr. 46, 62). Neither maintains an office outside of his home, or employs assistants, or bids on jobs (Tr. 47, 62-63, 92-93). Neither is licensed as a building contractor in the State of California (R. 32; Tr. 57, 95).[5]

In August 1966, Vance worked for Webb and Lipow, a subcontractor engaged in shoring and underpinning work at a construction project in Los Angeles (R. 31-32; Tr. 15). Vance's job was to haul loose dirt away from holes being drilled by Webb and Lipow's drill rig operators (R. 31; Tr. 15-16). Initial contact with Vance was made about a week earlier by construction foreman Fletcher, who called a subcontractor and asked for a "skip-loader" (Tr. 19, 37). The subcontractor, in turn, called El Monte, which referred Vance to the job (Tr. 48).

When Vance reported for work, Fletcher told him that his job would be to remove the loose dirt, keep it from dropping back into the holes and

[4] Vance does from 60% to 70% of his work for building contractors, the remainder for private home owners or plumbers (Tr. 44). Watson works primarily for building contractors, occasionally for private home owners (Tr. 62).

[5] The California Business and Professions Code requires the licensing of persons engaged in construction work, including excavating, but exempts "any person who engages in the activities herein regulated, as an employee with wages as his sole compensation." See Sections 7053, 7026; *Johnson v. Silver*, 161 Cal. App. 2d Supp. 853, 327 P. 2d 245, 246.

stay ahead of the drill rigs (R. 31; Tr. 37, 38-39, 40). He told Vance where to dump the dirt and what his hours would be (Tr. 38-40). Pursuant to these instructions, Vance co-ordinated his activities with those of the drill rig operators, taking the same lunch breaks and working the same hours that they did (Tr. 39). Fletcher, the only supervisor on the job, considered Vance to be one of Webb and Lipow's employees (Tr. 15, 19, 37-40).[6]

For about 3 months in 1966, Watson's services were used by three contractors, Swinerston and Wahlberg Company, Oltmans Construction Company, and Jackson Bros., on a shopping center project in Glendale, California (R. 32; Tr. 64, 67). Originally referred to Jackson Bros. by "an excavating friend who couldn't make the job", he thereafter did grading work for all three of them, shifting back and forth as his services were required and receiving his assignments from the respective job superintendents (R. 32; Tr. 63-69).

Watson's work consisted essentially of grading definite areas, the boundaries and levels of which had previously been staked out by acknowledged employees (R. 32; Tr. 98-99). "[He] would grade out one [section], and they would hand grade it or lay their steel and pour it, and [he] would come in and do the next one" (Tr. 66). When he finished each piece of work, he checked with the superintendent to see if it was satisfactory and received instructions as to what to do next (Tr. 99-100). Occasionally he was asked to do some part of the work over again (Tr. 100).

Both men paid all expenses involved in the operation and maintenance of their equipment and received payment from the contractors at

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[6]Webb and Lipow forwarded payment to El Monte for Vance's services. El Monte deducted its commission and remitted the balance to Vance (Tr. 57-58).

hourly rates, without deduction for social security or income taxes (R. 31; Tr. 44, 46-47, 60-61, 63, 93).[7]

II. THE BOARD'S DECISION AND ORDER

On the basis of the foregoing facts, the Board found that Vance and Watson served as employees of Webb and Lipow and the shopping center contractors, respectively, and were not independent contractors as to them. Accordingly, the Board ordered that the complaint be dismissed in its entirety.

ARGUMENT

THE BOARD PROPERLY DETERMINED THAT THE OWNER-OPERATORS ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT.

Section 2(3) of the Act provides, in relevant part, that the term "employee" shall not include "any individual having the status of independent contractor." In enacting this provision, Congress did not define independent contractor status but intended that in each specific case the issue whether an individual is an employee or an independent contractor is to be determined by the application of general agency principles. *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256, and cases there cited.

Under agency principles all of the incidents of the relationship must be assessed and weighed and no one factor is decisive. One of the critical factors distinguishing employees from independent contractors in the common law of agency is the type and extent of control reserved by those for whom they work. As the court stated in *N.L.R.B. v. Phoenix Life Insurance Co.*, 167 F.2d 983, 986 (C.A. 7), cert. den. 335 U.S. 845:

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[7]Watson also owns a truck and trailer, and Vance rents a dump truck (Tr. 43-45, 60-61). Although this equipment was used to haul the skip-loaders to and from the job sites, it appears that it was not used in the actual grading and dirt-spreading operations in which the two men engaged in the instant case. See, e.g., Tr. 16.

> * * * [T]he test most usually employed for determining the distinction between an independent contractor and an employee is found in the nature and amount of control reserved by the person for whom the work is done. * * * [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, * * *. [I]t is the right and not the exercise of control which is the determining element (Emphasis added).

Accord: Restatement of the Law of Agency 2d, Sec. 220(1); *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709, 713 (C.A. 5); *N.L.R.B. v. Keystone Floors, Inc.*, 306 F.2d 560, 561-562 (C.A. 3); *N.L.R.B. v. Steinberg and Co.*, 182 F.2d 850 (C.A. 5); *N.L.R.B. v. Northwestern Publishing Co.*, 343 F.2d 521, 524 (C.A. 7).

Applying agency principles to the facts of the instant case, the Board properly found that Vance and Watson were employees of the contractors for whom they worked. As shown in the Counterstatement, pp. 3-5, both men owned and operated light pieces of excavating equipment known as "skip-loaders." They had no employees and no place of business outside of their own homes. They obtained work through informal referrals and were retained by construction superintendents on the job sites. They were paid by the hour rather than by the job, had no contracts governing the performance of the work, and, presumably, could be removed at will prior to completion of any job. They performed work which was an essential part of the normal operations of the contractors, with Vance coordinating his activities with drill rig operators and with Watson's work sandwiched between that of the employees who set the grade stakes and the hand shovelers or concrete pourers who came afterwards.

As the Board found (R. 45), the "supervision exercised over Vance and Watson" was, in the "context of the work to be performed," "apparently no less than that exercised over acknowledged employees of the various contractors." Neither Vance nor Watson set their own hours or exercised significant discretion as to how their work was to be performed. Their initial instructions clearly defined the manner of accomplishing the tasks assigned to them. Vance was told, "this loose dirt, we want you to take your loader and haul it and move it away and level it and spread it—take it out on the lot and spread it, and as the drill rigs—keep ahead of them, and keep up with them" (Tr. 40). The only supervisor on Vance's jobsite was a Webb and Lipow supervisor, Fletcher, who testified without contradiction that he directed Vance's work (Tr. 37-40). Although Vance received no additional instructions after his first day on the job, this was not because he was free to choose the means by which to accomplish a result, but rather, as the Board observed, because the "simple description of the job assignment limited the manner and means to be used to accomplish the job" (R. 44). As Fletcher himself explained, "you give the orders what is to be done, and that is all you *need* to do. * * * This is all he had to do—just spread the loose dirt" (Tr. 41, 42, emphasis added).

Watson's work was similarly laid out for him in advance, i.e., the desired grade was determined and marked, leaving only the mechanical work to be done. Upon the completion of one grade, Watson was told where to grade next. The superintendent checked his work and on those occasions when it was improperly performed, ordered it done over (Tr. 100). We submit that the Board could properly find, on the basis of these uncontradicted facts, that Vance and Watson were subject to substantial control by their job superintendents as to the details of their performance.

Although, to be sure, ownership of the instrumentality with which the work is performed is some evidence of independent contractor status, its significance lies in the fact that an individual who brings his own equipment to the job is less likely to follow another's direction in its use. See *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F.2d 756, 759 (C.A. 3); Restatement of the Law of Agency, Section 220, comment k. Petitioner loses sight of the fact that where the owner "surrenders complete dominion over the instrumentality and the right to decide how it shall be used, as here, then the fact of ownership loses its significance." *N.L.R.B. v. Nu-Car Carriers, Inc., supra.* Thus, owner-drivers—even those who perform their services away from the employer's job site, such as over-the-road truck drivers—have on other occasions been found to have employee status under the Act. See, e.g., *Deaton Truck Lines, Inc. v. N.L.R.B.*, 337 F.2d 697 (C.A. 5); *N.L.R.B. v. Nu-Car Carriers, Inc., supra*, 189 F.2d 759.[8] The facts surrounding the work of Vance and Watson (*supra*, pp. 3-5, 6-7) clearly show that the requisite control was present in the instant case notwithstanding their ownership of the light equipment which they used in the work.

Petitioner argues that what is significant is not the degree of control reserved over the means, but rather, whether "control [is] exercised in fact * * *" (Br. 8). The case law (*supra*, pp. 5-6) is, however, unanimously to the contrary, and the two cases cited by petitioner do not support the result which it seeks in this case. Actually, *Construction, etc. Drivers Local Union No. 83, IBT (Marshall & Haas)*, 133 NLRB 1144, 1144-1145

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[8] Nor did the Company in *Deaton* withhold taxes or social security from its payments to the owner-drivers. See 143 NLRB 1372, 1384. Accord: *N.L.R.B. v. Keystone Floors, Inc.*, 306 F.2d 560 (C.A. 3), enforcing 130 NLRB 4, 9; *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (C.A. 5), enforcing 130 NLRB 680, 682.

(Pet. Br. 8-9), is precedent for the Board's finding that Vance and Watson were employees. There, owner-drivers "were hired to perform a specific hauling operation * * * Each driver was required to load his truck in succession at the Yuma plant and drive the mixer to the batch operation at the construction site. There each unloaded in turn and returned to the Yuma plant for reloading. * * *" The drivers were "at all times subject to the direction and control of [a representative of the principal]" (133 NLRB at 1145) and were "required to operate in tandem formation and maintain this steady pattern of unloading" (133 NLRB 1145, 1147). In the instant case, the work was also done in accordance with a rigid, predetermined system or formula; and what is more, it was performed on the job site in the continuous presence of a superintendent, who clearly could have intervened at any time in the event of a departure from the preordained plan.[9]

N.L.R.B. v. Servette, Inc., 313 F.2d 67 (C.A. 9), upon which petitioner relies so heavily (Br. 9-13, 16), is distinguishable. That case involved written franchise agreements specifically designed to create a "bona fide wholesaler-retailer relationship to deal in Servette products" (313 F.2d at 69). Each driver purchased his own route, owned his own truck, furnished his own display racks and determined his own hours. He was free to hire a helper or replacement and to determine the helper's compensation and hours of work. He was subject to little if any formal supervision,[10] and suffered a loss on unsold merchandise. See *Servette, Inc.*, 133 NLRB 132, 138,

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[9]None of the cases cited by petitioner as "strikingly similar" deal with relationships having these important characteristics. See Pet. Br. 16-17.

[10]He was, however, required to file daily sales reports.

146. Although, by virtue of its contracts with the routemen, Servette retained some control over their performance, the routemen manifestly had more independence in their work for Servette than did Vance on the Webb and Lipow job, or Watson on the shopping center project. Moreover, Vance and Watson were *hourly paid:* Sound management of their time and energies was of little importance to them in their work on these job sites.[11] As this Court observed in *Servette*, independent contractors are those who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is upon profits." 313 F.2d at 71, citing with approval, *Shamrock Dairy, Inc.*, 119 NLRB 998, 1005. Accord: *N.L.R.B. v. Steinberg & Co.*, 182 F.2d 850, 854 (C.A. 5); H. Report 245, 80th Cong., 1st Sess., April 11, 1947, p. 18. Vance and Watson clearly do not fit this mold.[12]

Of course, there were elements in Vance and Watson's work relationships which are often associated with independent-contractor status. Vance

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[11] Of course, like other employees in the construction industry who move from job to job, they would benefit from a reputation as good workers.

[12] The record provides little support for petitioner's contention that the parties "believed they were creating a principal-independent contractor relationship and not an employer-employee relationship" (Pet. Brief, p. 15). The informality with which both men were referred to the jobs and retained, the lack of a contract governing the performance of the work, and the fact that neither was licensed as a contractor in the State of California, would all seem to suggest the contrary. In fact, Superintendent Fletcher testified that he hired Vance, directed his work, and regarded him as one of *his* employees (Tr. 15-19). That Vance in one instance, and possibly where a private homeowner was involved, chose to bring legal action through the courts to collect money due, rather than proceed before a State labor commission, is hardly evidence of the intention of the parties in the instant case.

and Watson were not as obviously "employees" as are construction workers who are supplied with equipment, work for only one employer, and are treated for tax purposes as regular employees. Indeed, this case, like *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 258, may even present one of the "innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor * * *." The Board, however, considered all the elements in the work relationship between the owner-drivers and the contractors, and found (R. 45) that "sufficient control over the manner and means by which Vance and Watson performed their duties was retained by the contractors to vitiate the [Examiner's] conclusion that Vance and Watson were independent contractors." Here the "least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should [uphold the Board's finding]." *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 260.[13]

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[13] Although the Trial Examiner found that Vance and Watson were independent contractors, the Board "only disagreed with the examiner as to inferences to be drawn from established facts. This was of course the Board's prerogative" (*N.L.R.B. v. Stafford Trucking Inc.*, 371 F.2d 244, 249 (C.A. 7)). See also, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496; *Oil, Chemical & Atomic Workers, etc. v. N.L.R.B.*, 362 F.2d 943, 945-946 (C.A.D.C.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied.[14]

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[14]The only issue before the Court is whether the Board properly dismissed the complaint on the ground that Vance and Watson were employees rather than independent contractors. Accordingly, should petitioner's contention be sustained, we respectfully submit that the case should be remanded for further proceedings consistent with the Court's disposition of this issue, and not, as petitioner asserts (Br. 18) with instructions to enter an order "adopt[ing] the recommended decisions of the Trial Examiner . . ." *Retail Store Employee's Union, Local 400, etc. v. N.L.R.B.*, 360 F.2d 494, 495-496 (C.A.D.C.); *Local 152, Teamsters v. N.L.R.B.*, 343 F.2d 307, 309 (C.A.D.C.); *Retail Clerks Union, Local No. 1179, etc. v. N.L.R.B.*, 376 F.2d 186, 191 (C.A. 9). See also, *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372-374.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

* * *

DEFINITIONS

Sec. 2 when used in this Act–

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employement, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

UNFAIR LABOR PRACTICES

* * *

Sec. 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents–

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform

any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor oragnization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

No. 22544

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER.

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ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER.

I.

Statement of the Case.

In its statement of the case, intervenor adopts the recitations of the petition "only to the extent that they are consistent with the exceptions noted in Appendix 'A' attached" to intervenor's Brief. It is submitted that the five exceptions to appellant's statement of the case are specious.

Exceptions Nos. 1, 2 and 4 argue that the Board did not affirm the Trial Examiner's findings of violations of Section 8(b)(4) of the Act, assuming Vance and Watson to be independent contractors. We read the Board decision differently since the findings, conclusions, and recommendations of the Trial Examiner relating to a finding of violation (except for the inde-

pendent contractor issue) are entirely "consistent [with]" the Board decision. However, the distinction is of no consequence since the violation of the Act is obvious from a reading of the Trial Examiner's decision. After an appropriate remand of the case to the Board, we have no doubt concerning the Board's disposition of the case.

In exception No. 3, intervenor objects to our reference to an investigation by the General Counsel "sustaining" the charges. Section 102.74 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series "A" as amended, provides (under the Section heading "*Complaint and Formal Proceedings*") that "if it appears to the Regional Director [after full investigation] that the charge has merit, formal proceedings in respect thereto shall be instituted in accordance with the procedures prescribed in Sections 102.15 to 102.51, inclusive," *i.e.*, the issuance of complaint and subsequent procedures. *Black's Law Dictionary, Fourth Edition*, defines "sustain" as "to support; to warrant." It is clear that the General Counsel, acting through the Regional Director, made the preliminary determination that the charge had merit, *i.e.*, "sustained" the charge, before he issued complaint thereon. Indeed, the issuance of complaint without such determination would have been a flagrant violation of duty.

Finally, in exception No. 5, intervenor quotes from page 39 of the transcript in an attempt to demonstrate one item of evidence of "control reserved or control exercised in fact by the contractor."

Following the witness's acquiescence in the leading question by the Trial Examiner, *i.e.*, "there was no

supervision from Carl's Trenching and Digging Company on the job, was there?", the attorney for the General Counsel of the National Labor Relations Board then re-examined the witness on that answer. The pertinent testimony follows:

"Q. (By Mrs. Robbins) Mr. Fletcher, you said that you told Vance how to do his work.

Would you explain what you mean? What did you tell him?

A. What I tell him is this: 'this loose dirt, we want you to take your loader and haul it and move it away and level it out and spread it—take it out on the lot and spread it, and as the drill rigs—keep ahead of them, and keep up with them,' and that is it.

Q. Then if he did in fact spread the dirt, did you give him any further instructions on what to do?

A. No. That is all that I tell him.

Q. Did you tell him this every day, or—

A. Just one time. The first day he arrived you give the orders what is to be done, and that is all you need to do.

Q. And then it was up to him to do it?

A. Right."

If either "control reserved or control exercised in fact" is established by an initial description by the customer to the independent contractor of the nature of the work he is to perform, then not a single independent contract arrangement is free from attack on the theory that a conversation between the contracting parties makes them, in fact, employer and employee.

II.

Argument.

The Board frankly acknowledges in its Brief that "there were elements in Vance and Watson's work relationships which are often associated with independent-contractor status," and that it may be "difficult to say whether [Vance and Watson are] employee[s] or . . . independent contractor[s]." (Board's Brief, pp. 10 and 11.) The Board proceeds to argue in effect that the Board is entitled to be wrong, if only barely so, under authority of *NLRB v. United Insurance Co.*, 390 U.S. 254, 260.

The Board has graciously conceded that we have our foot in the door. We now propose to open wide that door.

Both the Board and the intervenor argue that it is *control reserved* and not *control exercised* that is significant, quite ignoring the fact that in many cases the only evidence of control reserved is that which may be inferred from control exercised.

Here the distinction between control reserved and control exercised is unimportant, since neither existed in fact. (See discussion of intervenor's Objection No. 5 in "Statement of the Case" hereinabove.) Since the record contains no such evidence of control, it was necessary for the Board to find control "apparent." Thus, the Board found [R. 45] that the "supervision exercised over Vance and Watson" was, in the "context of the work to be performed," "*apparently* no less than

that exercised over acknowledged employees of the various contractors." (Emphasis added.)

In its reference to the "context of the work to be performed," the Board is saying in effect that there just cannot be an effective independent contractor relationship between Vance and Watson (or like owner-operators) and their customers, *whatever may be intended by the parties,* and *whatever may be the other facts and circumstances,* so don't even try to create one. Thus, the Board has fenced off an area within the construction industry and marked it with a sign "independent contractors keep out."

Both the Board and the intervenor persist in the misstatement that "Vance and Watson were *hourly paid.*" (Board Brief, p. 10.) The emphasis is that of the Board, and the false implication is that Vance and Watson, work for an hourly *wage.* The truth is, of course, otherwise. The mechanic who repairs your car and the plumber who repairs your sink are not made your employees by virtue of the fact that the charge to you is on an hourly basis. Such charges are not, as implied here, hourly wages.

We now look to the *Shamrock Dairy* standards approved by this court in *NLRB v. Servette, Inc.,* 313 F. 2d 67 (C.A. 9, 1962).

1. Vance and Watson did not "work for wages or salaries."

2. Vance and Watson did not work "under direct supervision."

3. Vance and Watson did "undertake to do a job for a price and decide how the work [was to] be done." The customers bargained for results, not means.

4. While Vance and Watson did not "usually hire others to do the work," this is a feature in common with *Servette,* and with all of the cases cited at pages 16 and 17 of our opening Brief. Indeed, in *Servette* the dozen driver-salesmen in question enjoyed admitted employee status for many years prior to their conversion to independent contractor status.

Vance and Watson own or rent the equipment they use, pay all of their own costs, including insurance, fuel, repairs, and services on their equipment as well as bookkeeping, telephone, advertising and parking expenses. No deductions for social security or income tax are made. During the last year Vance performed services for about 100 customers and Watson for approximately 75. Watson has signed a collective bargaining agreement with petitioner [Tr. Vol. I, p. 4], whereas Vance brought a legal action, rather than a Labor Commissioner claim, when he was owed money. [Tr. Vol. II, p. 96.]

Despite all of the foregoing indicia that Vance and Watson considered themselves to be independent contractors and consistently behaved as such, the Board makes the startling statement in footnote 12 of its Brief that "the record provides little support for petitioner's contention that the parties 'believed they were creating a principal-independent contractor relationship and not an employer-employee relationship.' "

If, then, we set aside the Board contention of "apparent" control, the only remaining indicia of an employer-employee relationship are (1) that Vance and Watson worked for themselves, *i.e.,* did not have employees, and (2) neither Vance nor Watson possessed a license as a contractor.

The factual findings of the Trial Examiner [Tr. Vol. I, p. 31] are clearly supported by the record, and as clearly require the finding that Vance and Watson are self-employed persons and not employees:

> "The persons for whom Vance and Watson performed work had the right of control only over the end to be achieved and not over the means to be used in reaching such end. Vance and Watson were independent contractors in law and as a matter of economic reality. They were persons and self employed persons. They determined their own profits by what they paid for, or the rate at which they rented, their equipment; they set their own rates of pay; they determined what repairs and services they needed and arranged for the same to be done; they determined what insurance they needed and paid for the same. They were told what they should do but it was substantially left to them as to how they should achieve the ends. They assumed the risks of their businesses. They were to accomplish results or to use care and skill in accomplishing results. The control exercised by the contractors with respect to Vance and Watson was limited to the achievements of a desired result and did not include control of the means. They were self employed persons within the meaning of the Act."

At page 5 of its Brief, intervenor makes the contention (despite its wholly contrary position at the time of the hearing) that the court should not look to the relationship of Vance and Watson to other persons, *i.e.*, their other customers, in determining the issue here. Intervenor would prefer that the Court wear blinders so that it can see no more than Vance operating a dump truck and Watson a skip loader, working on a job very much as employees work. It is only such a narrow view of the operations of Vance and Watson that can explain the Board's finding of employee status. When we look beyond, we see that Vance and Watson, in their relationship to *all* their customers, work not for wages but for profits, that they own or rent their equipment, that they maintain a regular place of business and incur substantial regular expenses, none of which are paid for by their customers, that they work for scores of customers in a given year, *i.e.*, not regularly for a single "employer," and that they have consistently treated themselves as self-employed persons by the signing of a collective bargaining agreement, by treating sums owed them as contract debts rather than wages, by setting the prices on jobs which they perform, and by being paid gross billings which do not reflect the numerous deductions which appear on every employee's paycheck.

III.

Conclusion.

We concur with the comment in footnote 14 of the Board's Brief that "should petitioners' contention be sustained . . . the case should be remanded for further proceedings consistent with the court's disposition of this issue."

We submit that the Board's decision was not "between two fairly conflicting views," that the Trial Examiner was correct in his finding that Vance and Watson are self-employed persons and not employees, and that the Board decision should be denied enforcement.

Dated: August 5, 1968.

Respectfully submitted,

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No. 22545

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD TYSK, INDIVIDUALLY AND AS MONTANA STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, AND STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR,

Appellants

v.

HENAULT MINING COMPANY,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

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FOR THE NINTH CIRCUIT

No. 22545

HAROLD TYSK, INDIVIDUALLY AND AS MONTANA STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, AND STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR,

Appellants

v.

HENAULT MINING COMPANY,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinions of the Hearing Examiner and the Bureau of Land Management appear in the reproduced record at pages 11-24 and 25-31, respectively. The Secretary of the Interior's opinion (R. 32-52) is reported at 73 I.D. 184. Chief Judge William J. Jameson's opinion (R. 138-150) is reported at 271 F.Supp. 474.

JURISDICTION

Judgment was entered on August 28, 1967 (R. 152). Notice of appeal was filed October 23, 1967 (R. 155). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether Henault established a valid discovery on the effective date of the Multiple Surface Uses Act of 1955, without showing physical exposure of valuable mineral deposits within the limits of its claims, which would operate to deny management of the nonmineral surface resources by the United States pursuant to that Act.

2. Whether the Secretary's decision, that Henault had not as yet made a valid discovery, was supported by substantial evidence on the record as a whole and should have been affirmed.

STATUTES INVOLVED

Section 1 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2319, 30 U.S.C. sec. 22, provides in pertinent part:

> That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 2 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2320, 30 U.S.C. sec. 23, provides:

> That mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end-lines of each claim shall be parallel to each other.

Section 4 of the Multiple Surface Uses Act of 1955, 69 Stat. 368-369, 30 U.S.C. sec. 612, provides:

> (a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
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> (b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to

manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall,

> prior to issuance of patent therefor, sever, remove or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under the preceding subsection (b). Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

STATEMENT OF THE CASE

This action was instituted by the Henault Mining Company in November 1966 to reverse the Secretary's decision that the United States was entitled to manage the vegetative and othe nonmineral surface resources on Henault's 18 contiguous, unpatented lode mining claims, pursuant to Section 4 of the Multiple Surface Uses Act of 1955, supra (R. 2).[1/] The district court reversed the Secretary's decision by summary judgment (R. 152). The basic facts are undisputed and may be summarized as follows:

Henault located 21 mining claims prior to July 1955 on federal lands in the Black Hills of South Dakota (R. 3). The claims are adjacent to the Homestake Mining Company's patented

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1/ Henault asserted the jurisdiction and venue of the district court to be founded on the Administrative Procedure Act, 5 U.S.C. (1964 ed.) Supp. II, secs. 701-706; The Declaratory Judgment Act, 28 U.S.C. secs. 2201-2202; the "mining laws," 30 U.S.C secs. 21 et seq.; the Multiple Surface Uses Act of 1955, supra; "43 U.S.C. secs. 1-15;" and the Fifth Amendment, U.S. Const. Jurisdiction and venue were also alleged to be based on 28 U.S.C secs. 1361 and 1391(e), respectively. (R. 2.) We agree that 28 U.S.C. sec. 1361 confers a limited jurisdiction on the district court over actions in the nature of mandamus to compel a federal officer or employee to perform a ministerial duty. Sinc this is so, we do not brief reasons why other bases alleged for jurisdiction are erroneous.

mining claims, that company being the largest gold producer in the United States.

This proceeding originated in the Department of the Interior, pursuant to the Multiple Surface Uses Act of 1955, supra. The United States maintained that it was entitled to manage the nonmineral surface resources because Henault had not made a discovery of valuable minerals within the limits of its unpatented claims. (R. 3, 11.)

In the proceedings before the Hearing Examiner, Henault averred that it had expended approximately $57,000 in assessment work on the claims since 1945 (R. 24).[2/] Henault's testimony focused on the geology of the area which it said favored exploration at depth, at an estimated drilling cost of $360,000 to $480,000, with indications that the Homestake formation in some form may run through its claims at depths of 3,500 to 4,000 feet (R. 13, 14, 37, note 1). Both the Government and Henault introduced assays of samples taken from the surface of the claims, which indicated "similar results" (R. 19-21). The Hearing Examiner found that, although Henault had not uncovered any mineral deposits which can be worked at a profit, a discovery had been made on the claims in question (R. 12, 16).[3/]

2/ Henault's proposed finding of the amount of assessment work was rejected by the Hearing Examiner as being immaterial to the issue of discovery (R. 22, 24).

3/ The Government recognized the rights asserted by Henault as to two of the 21 claims and Henault did not appeal from the ruling of nondiscovery as to the Automobile claim, thus leaving 18 claims in dispute in subsequent proceedings in the Department of the Interior, the district court and here (R. 3-4, 16, 25, 28-29, 33-34, 39, 138).

On appeal by the United States, the Bureau of Land Management reversed. It ruled, inter alia, that Henault's "testimony and exhibits at most indicate that the mining claims involved warrant further exploration to determine whether the Homestake formation is under the claims and whether it is sufficiently mineralized" (R. 28).

Henault appealed to the Secretary, who affirmed (R. 32-52), observing that geological inference standing alone has never been accepted as a substitute for actual exposure of valuable minerals in order to constitute a discovery (R. 38-39). The Secretary commented that Henault "has failed to distinguish between 'exploration' and 'development' and that it has ignored the long-recognized requirement that the vein or lode upon which a discovery is based must be exposed within the limits of each claim" (R. 43). Answering Henault's suggestion that BLM "has required the actual development of a valuable mine with proven ability to produce at a profit," the Secretary said that "the second stage of a mining venture, the exploration, must have satisfactorily progressed to the point at which the further expenditure of money and effort for the third phase [development] may be favorably contemplated" (R. 45). He noted that Henault, by its own testimony, had not entered upon the exploratory stage (R. 43-45), and that "until the recommended exploratory steps

are taken, there would appear to be no basis for determining whether a prudent man would be justified in expending money and effort with a reasonable expectation of developing a profitable mine" (R. 46). The Secretary concluded (R. 51-52):

> the determination here need not prevent further efforts by the appellant to explore and develop the mineral deposits which may be found within the limits of its claims. The appellant is free to undertake the drilling program recommended by Wright. As long as the land remains open to the operation of the mining laws, the claimant is protected in its right to such deposits as may be found, but until a patent is issued, its use of the land embraced by the claims is limited to mining and other uses of the land incidental to mining.

Henault then filed this action in the court below (R. 2-10). On cross-motions for summary judgment (R. 62, 83), the district court reversed, concluding that the Secretary's decision "was based on an erroneous legal theory and is not in accordance with law" (R. 150). While seeming to agree that geological inference standing alone is insufficient to constitute a discovery (R. 144-145), the court said (R. 146): "In my opinion the Government has in effect required 'a showing of commercial value' in this case." It rejected the Secretary's distinction between "exploration" and "development" (R. 147-150). Summary judgment, reciting that the Secretary's decision was "arbitrary, capricious and an abuse of discretion * * *," was then entered (R. 152-153). This appeal followed.

SUMMARY OF ARGUMENT

I

Introduction. The restricted decision of the Secretary accords with the purposes of the Multiple Surface Uses Act of 1955. It did not invalidate Henault's mining claims, but merely declared that Henault had not made a valid discovery. The decision expressly recognized Henault's continued right to explore and to use surface resources incidental thereto. The only result of the Departmental decision was to permit government use of the surface for other purposes subordinate to Henault's mining operations.

A. To constitute a valid discovery, the mineral lode claimant is required to physically expose, within the limits of his claim, a vein or lode of mineral-bearing rock in place possessing in and of itself a present or prospective value for mining purposes. Speculation, hope, and the like have been held insufficient over and over again. This standard has been repeatedly stated by the Supreme Court, this Court and other court It is also supported by a long history of consistent administrative construction of the relevant statutes.

B. In the case at bar, the undisputed facts show that Henault had not actually uncovered a valuable mineral deposit within the limits of its claims. The mineralization found was concededly valueless. The Secretary therefore correctly ruled that Henault had not as yet established a valid discovery.

The geological information, relied upon by the district court in overruling the Secretary, suggests only that additional exploratory work be done to ascertain whether a deposit does in fact exist within the limits of Henault's claims, so as to raise the issue whether, under the prudent-man standard, any mineral that might be found constituted a valuable deposit. The Secretary's decision does not preclude such work. Moreover, Henault may not have a right to mine the particular formation containing gold which it hopes lies at depth within its claims, under the "apex law" of mining.

The district court's result is founded on speculation and departs from settled law.

C. Assuming that Henault had exposed a mineral deposit, it is plain that the Secretary was correct in deciding that Henault had not made a valid discovery. The evidence is clear that nothing of value has been found. The prudent-man standard requires a showing of valuable minerals. It follows that Henault failed to show a valid discovery under that standard.

II

Since the Secretary applied the correct standards and his decision rests on substantial evidence, the district court was not warranted in rejecting the Secretary's conclusion.

ARGUMENT

I

THE DISTRICT COURT ERRED IN RULING THAT HENAULT HAD MADE A DISCOVERY OF A VALUABLE MINERAL DEPOSIT WITHIN THE LIMITS OF ITS CLAIMS

Introduction. We believe the decision below disregards the nature and consequences of the proceedings in the Department of the Interior and the Secretary's decision. The proceedings were instituted, not to divest Henault of its mining claims, but to determine management and disposal rights of surface resources pursuant to the Multiple Surface Uses Act of 1955, supra.[4/] This necessitated inquiring as to whether a valid discovery of minerals had been made. It was undisputed that Henault has not as yet uncovered any mineral deposits on its claims.

In ruling that Henault had not made a valid discovery, the Secretary carefully specified that his determination did not prejudice Henault's rights to further exploration, to such deposits as may be found, and to use the surface resources incident

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4/ This Court, in Funderberg v. Udall (No. 21884, June 11, 1968) not yet reported, discussed some purposes of the 1955 Act. One purpose was to provide "for conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent land * * *." Section 5 of the 1955 Act established an in rem "procedure for determining expeditiously title uncertainties resulting from the existence of abandoned, invalid, dormant, or unidentifiable mining claims, located prior to the enactment of the bill." 2 U.S.C. Cong. and Admin. News, 84th Cong., 1st sess. (1955) pp. 2474-2475, 2483-2484. While the record does not disclose when Henault first entered upon these claims, Henault has alleged that it has done assessment work for over 20 years (R. 3, 24).

to mining (R. 51-52). If and when Henault does find a valuable mineral deposit and its claims go to patent, the Government's rights in the surface resources will cease. Cf. Davis v. Nelson, 329 F.2d 840, 845, 847 (C.A. 9, 1964). Thus, no forfeiture is involved. Further, even without the 1955 Act, the use of the surface of mining claims is limited to uses connected with mining. United States v. Etcheverry, 230 F.2d 193, 195 (C.A. 10, 1956); Teller v. United States, 113 Fed. 273, 280-284 (C.A. 8, 1901); United States v. Rizzinelli, 182 Fed. 675, 681-684 (D. Idaho 1910). The 1955 Act thus declared existing law and implemented it pursuant to a declared policy of more rigorous enforcement of limitations on the rights of mining claimants.

Assuming Henault does not intend to use the surface for some impermissible purpose, the basis for Henault's and the district court's quarrel with the narrow, limited Secretarial holding is indeed elusive.[5/]

A. Settled law requires a physical rather than a theoretical demonstration that a mineral deposit exists. - Since 1872 the federal mining laws have authorized citizens to explore, discover and extract valuable minerals from the public domain and to obtain fee title to lands containing such discoveries.

5/ We do not imply that there is record indication that these claims are sought for a purpose other than their potential mineral value.

Section 1 of the Act of May 10, 1872, supra. The obvious intention has been to stimulate and encourage the development of the nation's mineral wealth by rewarding the successful prospector with the opportunity to acquire, at a price of $2.50 an acre for placer claims and $5.00 an acre for lode claims,[6/] title to the land in which the minerals are discovered. To qualify for that reward, the prospector must show that he has made a "discovery" of a "valuable mineral deposit." In the case of a mining claim on a vein or lode, Congress specified that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Sectio 2 of Act of May 10, 1872, supra.

Interpretation and application of those terms have been the task of the Department of the Interior which, acting "as a special tribunal," is authorized to administer the laws "regulating the acquisition of rights in the public lands," and of the Secretary of the Interior who is "charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved * * *." Cameron v. United States 252 U.S. 450, 460 (1920); Best v. Humboldt Mining Co., 371 U.S. 334, 337 (1963); United States v. Coleman, 390 U.S. 599, 600, note 1 (1968); Palmer v. The Dredge Corp. (C.A. 9, Nos. 21435 and 21436, June 26, 1968) not yet reported.

6/ R.S. secs. 2325 and 2333, 30 U.S.C. secs. 29 and 37; 43 C.F.R. (1967 rev.) secs. 3453.6 and 3470.1.

Judicial as well as administrative decisions show that, except in controversies avoiding subversion of the intent of the mining laws or not adversely affecting the public interest in federal lands, the lode claimant has been required to physically expose, within the limits of his claim, a vein or lode of mineral-bearing rock.

1. It was early held by the Supreme Court that the requirements for a discovery were not satisfied by "mere indications" of the vein, lode or deposit. In Iron Silver Mining Co. v. Reynolds, 124 U.S. 374, 384 (1888), a contest between placer and lode claimants, concerning a statute excepting from a placer patent veins or lodes "known to exist," it was stated:

> The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the intent of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact. [Emphasis by the Court.]

The Court there emphasized the "wide difference" between belief and knowledge.

The decision in United States v. Iron Silver Mining Co., 128 U.S. 673, 683-684 (1888), was the same. Justice Field declared (at 676): "There must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question. The form also in which the mineral appears, whether in placers or in veins, lodes or ledges, must be disclosed so far as ascertained." Justice Field continued (at 683):

> It is not enough that there may have been some indications by outcroppings on the surface, of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. * * *

Other such cases of that early era recognized the insufficiency of speculation or belief. Iron Silver Co. v. Mike & Starr Co., 143 U.S. 394, 402-403, 405-406 (1892), and dissenting opinion, 412, 421, 424-425, 430;[7/] Sullivan v. Iron Silver Mining Co., 143 U.S. 431, 435-436 (1892).

Specifically regarding Section 2 of the 1872 Act, supra, the Supreme Court in 1885 had stated earlier, "The discovered lode must lie within the limits of the location which is made by reason of it." Gwillim v. Donnellan, 115 U.S. 45, 50 (1885). This requirement was repeated in 1889, with the statement that discovery of a lode outside the boundaries of a claim "does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them." Dahl v. Raunheim, 132 U.S. 260, 263 (1889).

Failure to expose the vein or lode within the limits of the claim was the keystone for the Court's resolution of the problem whether a tunnel owner must adverse the patent applicati

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7/ The Court was agreed on such insufficiency but divided "upon questions of fact." Chrisman v. Miller, 197 U.S. 313, 321-322 (1905).

of a surface lode claimant, the Court saying that a tunnel is not a mining claim but only a means of exploration and that "Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface." Mining Co. v. Tunnel Co., 196 U.S. 337, 360 (1905). As Justice Van Devanter stated in Cole v. Ralph, 252 U.S. 286, 295 (1920): "While the two kinds of location--lode and placer--differ in some respects, a discovery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral (§2320), and to sustain a placer location it must be of some other form of valuable mineral deposit (§2329), one such being scattered particles of gold found in the softer covering of the earth. * * *" "Holding and prospecting" would not support a right to patent, he said (at 307), "for that would subject non-mineral land to acquisition as a mining claim."

At the same term of Court, in Cameron v. United States, 252 U.S. 450, 456, 459 (1920), Justice Van Devanter made clear that physical exposure was necessary under Section 2 of the 1872 Act (at 456): "To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located, Rev. Stats., § 2320 * * *."

The particular parties, the object of the proceeding, the mineral, and the statutory language may of course operate to relax the requirement of physical exposure. Such was the holding of Diamond Coal Co. v. United States, 233 U.S. 236 (1914), a suit by the United States to annul a patent as having been fraudulently obtained. Coal was the mineral involved. The statute there excepted "mineral lands" and "lands valuable for minerals" from patent application. Justice Van Devanter wrote (at 239-240):

> 3. To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and quantity as would render their extraction profitable and justify expenditures to that end. * * *

The evidence of fraud in obtaining the patent was deemed overwhelming (at 242-247), and while it was nowhere declared that a "discovery" of coal had been made which would meet the standard applicable to other statutes and circumstances, the Court concluded that the lands were "mineral lands," even though there had been no exposure of coal upon the particular lands. In reaching this result, the Court was impressed with the blatancy of the fraud, the particular mineral, and the language of the statutes involved, explaining (at 249):

> There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries.
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> * * * * *
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> It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines.

2. This Court has also decided that the claimant must physically expose minerals within the limits of the claim. In Multnomah Mining, Milling & D. Co. v. United States, 211 Fed. 100 (C.A. 9, 1914), the United States alleged that the lands were not mineral in character and that no mineral in paying quantities had been discovered thereon. This Court declared (at 101):

> There is doubtless in the land in controversy a small quantity of fine gold, such as may be found in all the lands along the Columbia river from its headwaters to the ocean. But the proof is convincing that no gold in paying quantities has been discovered on these claims. If the land included in these placer claims was mineral land, or contained mineral sufficient to justify mining, that fact was capable of demonstration. * * *

This Court answered (at 101) the claimant's contention that use of a different mining process might produce satisfactory production: "But the suggestion is a mere conjecture, based on no tangible or scientific evidence, and it does not avail to sustain

the validity of mining claims which were so evidently initiated without the discovery which the law requires." In concluding that there had been "no discovery," the Court referred (at 102) to its opinion in Steele v. Tanana Mines R. Co., 148 Fed. 678 (1906), that securing "colors of gold, 'and in some instances fairly good prospects of gold'," is insufficient.

In Steele, a contest between mineral and homestead claimants, this Court characterized the evidence as follows (148 Fed. at 679-680):

> The sum and substance of this evidence is, not that gold had been discovered on the claim in such quantities as to justify a person of ordinary prudence in further expending labor and means with a reasonable prospect of success, but that colors of gold had been found which were fairly good prospects of gold. Doubtless, colors of gold may be found by panning in the dry bed of any creek in Alaska, and miners, upon such encouragement, may be willing to further explore in the hope of finding gold in paying quantities. But such prospects are not sufficient to show that the land is so valuable for mineral as to take it out of the category of agricultural lands and to establish its character as mineral land when it comes to a contest between a mineral claimant and another claiming the land under other laws of the United States.
> * * *

See also Adams v. United States, 318 F.2d 861, 870 (C.A. 9, 1963

3. Other courts have reached the same conclusion. In Waterloo Min. Co. v. Doe, 56 Fed. 685, 689 (S.D. Cal. 1893), the court held that no discovery had been made, where the vein or

lode had not been found within the boundaries of the claim, although three tons of silver-bearing rock, yielding $600, had been extracted and even though there was "hope" of finding the vein or lode at some future time. "Mere outcroppings, whether appearing on the surface or in shallow works near the surface, do not satisfy the quantum of discovery." United States v. Mobley, 45 F.Supp. 407, 409-410, 413 (S.D. Cal. 1942). See also Oregon Basin Oil & Gas Co. v. Work, 6 F.2d 676-678 (C.A. D.C. 1925), aff'd per curiam, 273 U.S. 660.

Judge Christensen discussed the requirement of physical exposure of the vein or lode within the limits of the claim in the recent case of Ranchers Exploration and Development Co. v. Anaconda Co., 248 F.Supp. 708, 714, 716-720 (D. Utah 1965). He said (at 714): "To constitute a mineral discovery, something more than conjecture, hope or even indication of mineralization is essential * * *." He then stated (at 714-715):

> And while liberality in applying these rules will be indulged in determining superiority of rights as between private claimants, and there may be taken into account the geological indications and other discoveries in adjacent areas, as well as utilization made of developing technological aids, these of themselves may not be substituted for discovery of minerals within the exterior boundaries of the claim in question, as that discovery may be so aided. Otherwise, established public policy for the promotion of mineral resources through recognition of diligence

> as distinguished from speculation or monopoly could be frittered away and an express statutory requirement nullified without the comprehensive congressional re-evaluation and redirection that seem especially requisite in this field for any such basic change. [Footnotes omitted.]

"Decisions regarded as the most liberal would not countenance" a finding of discovery based on inference from "geological indications in the general area" (at 717). Repudiating (at 720) "pyramiding of an inference upon an inference, to merely infer as to an entire group of claims mineral discoveries on each because of geological trends or other discoveries somewhere in the group of claims," he required discovery within each claim. Concerning a plan for further exploration, modern methods, and advancing technology, he commented (at 717), "What might be established through future exploration will not evidence discovery at a prior date unless the existing circumstances have amounted to a discovery," and he labeled as "fallacious" (at 718) "The idea that large areas of public land may be privately pre-empted and withheld from everyone else by a mere paper plan for exploration," because that idea "would be the unwarranted judicial acceptance of speculative monopolization in lieu of mineral discovery" (at 719).

Other recent pronouncements on the requirement of actual exposure are those of the Tenth Circuit in Udall v. Snyder

and Udall v. Garula (Nos. 9671 and 9681, respectively, May 24, 1968) not yet reported. Responding to an argument based on geological indications, it said in Snyder:

> Of no determinative concern in this case are refinements of evidentiary problems concerning the extent to which resort may be had to technological aids and inferences in the modern context on the basic issue of mineral discovery as now defined by the Supreme Court.
> * * *

4. To give effect to the terms "valuable" and "discovery" and the mandate contained in Section 2 of the 1872 Act, supra, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," the Secretary also has long required actual and physical exposure of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes, and has rejected geological inference alone to establish existence of minerals. In East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911), the claimant's civil and mining engineer deposed (at 272) that the claims were located in an established mining district and that the surface mineral indications on the claims (when combined with his knowledge of the geological conditions of the district) suggested that valuable ore would be found at depth. No development of anything found was contemplated. The Secretary ruled (at 273-274):

It is evident from the record before the Department that the deposits alleged to have been exposed on these claims are regarded by the applicant as possessing practically no economic value, but that, on the other hand, title to the claims is sought essentially on account of their possible value for certain unexposed deposits supposed to exist at considerable depth beneath the surface, and having no connection, so far as shown, with any deposits appearing on the surface. The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes; and before patent can properly be issued or entry allowed thereon, that fact must be shown in the manner above stated.

The showing made by the claimant in the present case, even if it be regarded as supplemented by the report of the special agent, above referred to, is manifestly too vague, general and indefinite to warrant its being accepted as fulfilling the requirements above set forth, or as establishing the existence of a valid discovery of mineral upon any particular one or more of the claims embraced in the entry. For this reason, therefore, and aside from any other consideration, the entry, in its entirety, will be canceled.

On rehearing, it was stated (41 L.D. 255-256):

> Reading this petition in connection with the prior decision of the Department (40 L.D., 271) makes it evident that patent for these claims is being sought for the purpose of developing supposed deposits of ore--which we may call lodes--well below the surface of the ground, and that there is no claim that the deposits which it is intended to develop have been in fact discovered. The so-called discoveries on the surface of the various claims are supposed to indicate that other and unconnected veins or lodes lie at a greater depth. In other words, in these cases there is an apparent attempt to substitute observation, combined with geologic inference, for discovery. Whatever may be thought of its policy Congress has said in section 2320 of the Revised Statutes: "but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Obviously, the words "the vein or lode" can only refer to the lode which it expected to develop and mine and cannot refer to disconnected bodies of ore of no possible value in themselves. Congress having laid down this rule for the guidance of the Department, the Department can do nothing but follow the will of Congress in this particular. If the rule is in general, as has been insisted, too narrow a one, or if it does not fit particular localities, obviously the remedy is to be sought at the hands of Congress; and it would be usurpation of authority in this Department to attempt to amend, directly or indirectly, the unmistakable language of the statute.
>
> The question whether before patenting of a lode claim ore must be exposed of commercial value, which is somewhat elaborately discussed by counsel, is manifestly not in point. Any question as to the character of the vein or lode can only arise after the vein or lode on account of which patent is desired has been discovered. 8/

8/ Subsequent showing by the claimant of the existence of the vein or lode within the limits of its claims resulted in vacation of the cancellation. East Tintic Consolidated Mining Co., 43 L.D. 79, 81-82 (1914).

The testimony in Rough Rider and Other Lode Claims, 41 L.D. 242, 246 (1911) was "that it would be unprofitable to attempt to operate them [the claims] for iron, and that their only value lies in the fact that, in connection with other conditions disclosed upon the claims, and elsewhere in the district, they afford indications of the existence of other deposits at depth, valuable for copper mining purposes." The testimony was thus characterized (at 251):

> It is manifest from the showing herein made that the mineral-bearing quartz which, it is testified, was found on some of the claims in question, possesses no value whatsoever, either present or prospective, for mining purposes. Indeed, in the brief filed in the case in behalf of the entryman, it is expressly conceded that "the witnesses for the mineral entryman do not claim that the mineral discovered has any actual value in itself, or that mines could be successfully worked for the mineral discovered. The attorneys for the mineral entryman do not make such a claim."

Surface indications of minerals together with geological conditions of the area were held inadequate to support a discovery. 41 L.D. at 253-254.

Discussion of the essential ingredients of a valid discovery often includes the Secretary's formulation in Jefferson-Montana Copper Mines Co., 41 L.D. 320, 323-324 (1912):

> After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:
>
> 1. There must be a vein or lode of quartz or other rock in place;
>
> 2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
>
> 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.
>
> It is clear that many factors may enter into the third element: The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

Two of the claims there were rejected because "the testimony fails to disclose its [the vein or lode's] existence," though a plat showed a mineralized dike on the two claims. Three other claims were validated because "there has been a valid discovery of a vein or lode." 41 L.D. at 324.

The mining claimant's geologist and expert witness, in United States v. Edgecumbe Exploration Co., Inc., A-29908 (May 25, 1964), Gower Federal Service SO-1964-27 (Mining), was

of the opinion that continued exploration would result in the finding of valuable gold deposits in an established gold production district, although assays of the surface showings showed only small values. Citing Interior decisions, the Secretary stated the difference between exploration and development, noted that the company did "not claim to have found a deposit which in itself has value for mining purposes," and said:

> The exposure of substantially worthless deposits on the surface of a claim, the finding of mere surface indications of mineral within its limits, the discovery of valuable mineral deposits outside the claim, or deductions from established geological facts relating to it, one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself value for mining purposes. East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911).

The evidence and the contention made clear that "The question is not whether the gold discovered by the claimant is marketable but whether such a gold deposit has been found which would justify the development of a mine." See also United States v. Hurliman, 51 L.D. 258, 261 (1925); United States v. Converse, 72 I.D. 141, 149-151 (1965), aff'd sub nom. Converse v. Udall,

262 F.Supp. 583 (D. Ore. 1966), awaiting decision on appeal (C.A. 9, No. 21697); United States v. Snyder, 72 I.D. 223, 226-230, 232 (1965), aff'd per curiam, Udall v. Snyder (C.A. 10, No. 9671, May 24, 1968) not yet reported; United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235, 236-238 (1961).

It is clear, we submit, that the decided cases, both judicial and administrative, compel the claimant to physically expose, within the limits of his claim, a vein or lode of mineral-bearing rock in place possessing in and of itself a present or prospective value for mining purposes.

B. The undisputed facts show that Henault had not physically exposed a mineral deposit within the limits of its claims. - In the case at bar, the Secretary reviewed the basis for Henault's claim of a discovery, which review was expressly accepted by the district court (R. 34-38, 39, 42-43, 46-47, 142-144):

> The basic facts concerning the location, ownership, workings and surface mineralization of the claims are not in dispute. The claims were all located prior to July 23, 1955, and are presently owned by the appellant. At the hearing, both the Government and the mining claimant presented in evidence assays of numerous samples of minerals which were taken from the claims by Ernest T. Tuchek, a geologist employed by the Bureau of Land Management, and by Ernest Shepherd, a geologist working under the supervision of Lawrence B. Wright, a consulting geologist retained by the mining claimant. The samples were taken from various pits, cuts and adits on the claims during extensive examinations by the two geologists and were assayed for gold and silver values.

The Government's case was based solely upon the results of the surface examination and upon the lack of evidence disclosed by such examination of the existence of a vein or lode from which one might reasonably hope to develop a profitable mine. The appellant's case, on the other hand, was based primarily upon the testimony of Wright, who examined the appellant's claims in 1948 and in 1961 and made specific recommendations for further mineral exploration on the claims and whose deposition, taken at San Francisco, California, on October 3 and 4, 1963, was admitted in evidence over the vigorous protest of counsel for the Government.

The hearing examiner found from the testimony that the two geologists (Tuchek and Shepherd) met occasionally during their examinations but that their work was entirely separate, that they did not necessarily sample in precisely the same places but that a comparison of the values found in their samples revealed, within the limits of human tolerance, similar results. He noted that, although the gold and silver content of the samples taken varied from trace amounts to a high of $15.87 per ton in one sample, the values found in the great majority of the samples ranged from 9 cents to less than $1.00 per ton. The examiner found this evidence to be conclusive that there are exposed within the limits of each claim, except the Automobile lode, veins or lodes of rock in place containing some amounts of gold and silver, and he found the evidence to be conclusive that there is no surface exposure of minerals on any of the claims which can be mined at a profit.

The examiner further found that all of the experts in the field of geology who appeared at the hearing testified that the land upon which the claims are situated is mineral in character, that the claims are surrounded by patented mining claims and that they lie immediately adjacent to the present working area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit. He found that appellant's witness Wright has an intimate knowledge of the geology of the area, that he

was employed by the Homestake Mining Company from 1919 to 1931, for the last six years of that period as chief geologist for the company, that he is thoroughly familiar with all of the mining and geologic technical publications on the Black Hills region and that he conducted and supervised the examination of the Henault claims which culminated in the 1948 and 1961 reports. He then summarized Wright's conclusions as follows:

> "1. That the Henault Mining Company's claim group lies within the province of major gold mineralization in the Black Hills.
>
> 2. That the claims lie adjacent to the country's greatest producer of gold which is of no significance except that the geologic structural relations are such that the proximity has real value.
>
> 3. That the geology of the Henault ground is structurally related to that of the Homestake Mining Company's ground and ore deposits in such a manner that the possibility of deep ore deposits such as are being developed by Homestake may reasonably be expected at minable depths at Henault.
>
> 4. The values in gold and silver existing in Henault ground can only lead to the conclusion that these surface expressions are 'upward leaks' effected at the time of mineralization from substantial deposits below.
>
> 5. That the tertiary dike zone through the center of the Henault claims emplaced in an anticlinal structure (believed to elevate the favorable Homestake formation closer to the surface) is additional incentive to moderately deep exploration for substantial amounts of ore.
>
> 6. That all Henault holdings are of mineral character and, considering that almost all surrounding grounds have been patented, are entitled to the same consideration for patent."

The examiner then noted that Wright recommended that at least three holes be drilled to a depth of 3500 to 4000 feet to probe for minerals at depth. The soundness of Wright's recommendations was attested to by Professor Edwin H. Oshier, a mining engineer and head of the Department of Mining Engineering at the South Dakota School of Mines and Technology, who had not personally examined the claims but whose opinion was based upon a review of Wright's reports and upon Wright's reputation as an authority on the geology of the northern Black Hills.

The examiner found that, although the qualifications of the Government's expert witnesses could not be questioned, neither of the two witnesses who testified in behalf of the Government had as thorough a knowledge of the geology of the area as did Wright and that, from a geologic standpoint, their examinations did not approach those of Wright in thoroughness. He, therefore, accepted the recommendations of Wright as to the possibilities for following the veins or lodes on the surface of the Henault claims as being the best available information upon which a prudent man would rely. * * *

* * * * *

The hearing examiner then found that it had been established that on each of the claims, except the Automobile, there are veins of rock in place containing valuable minerals and that, although most of the assays revealed nominal or very low values which could not in any sense be considered worthwhile to mine, the mineralization was there, and, in view of the favorable geology of the area, he concluded that there had been a discovery on each of those claims. He acknowledged that his conclusion rested squarely on the acceptance of Wright's recommendations. * * *

* * * * *

There is essentially no dispute as to the facts of this case. It has not at any time been suggested that a workable mineral deposit has been uncovered on any of the claims in question or that any exposed area on the claims is a part of a vein or lode which, in itself, appears to contain values which would warrant efforts to develop a valuable mine. On the other hand, no effort was made by the Government to challenge the validity of the findings or the recommendations of appellant's witness Wright. Only the legal effect of his findings is challenged, and the sole issue in this appeal is whether those findings, considered alone or with the established facts of the case, are sufficient to constitute a discovery under the mining laws.

* * * * *

Factually, appellant's claim of a discovery is based on the following: The mineral values in the area are found in the Homestake formation which has been extensively mined for gold by the Homestake Mining Company on adjoining property. The Homestake formation dips toward appellant's claims and outcrops at some distance beyond the claims. Because of this Wright testified that he believed that the formation extends beneath the Henault claims. The formation does not outcrop on the claims but a number of Tertiary dikes do. These dikes are believed to originate below the Homestake formation and to penetrate that formation on their way to the surface. The slight mineral values found in the dikes by the extensive sampling are believed to represent leaks from the minerals in the Homestake formation. However, the really valuable mineral deposits are expected to be found at the intersections of the dikes with the Homestake formation and it is to establish this that Wright recommended the drilling of three holes to depths of 3500 to 4000 feet. Wright deposition, pp. 50-59.

> There is no contention that the Homestake formation has actually been exposed on any of the Henault claims. There is also no contention that the Tertiary dikes or intrusions carry valuable mineral deposits. They are claimed merely to establish that the Homestake formation, which is believed to carry the valuable deposits, lies below the surface, possibly a few thousand feet down.

The factual basis may thus be summarized: The exposed mineralization is valueless. No ore has been removed. While assessment work has been done for over 20 years, no development and operating expenditures have been made. Not only has no ore body been exposed, but there is no proof at all whether an ore body actually exists within the limits of the claims. The most that can be said for the indications of mineralization or geological inferences is that they have led to an expert recommendation that further exploratory work be done to ascertain whether valuable minerals do in fact exist on these claims at depth. The Secretary's restricted decision does not prejudice execution of that recommendation.

Moreover, the geological information does not totally favor Henault. Assuming, for argument purposes only, that the Homestake formation does lie at depth on Henault's claims, Henault cannot now say with any degree of definiteness that it would in law be entitled to mine the deposit. Depending upon the manner in which the Homestake formation manifests itself at depth within some or all of Henault's claims, it may well be that the Homestake Mining Co. could follow the formation from its

patented claims and would have rights superior to Henault's, under the "apex law" of mining. Section 3 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2322, 30 U.S.C. sec. 26; 1 American Law of Mining (1967) sec. 4.36, pp. 661-662. Henault did not and cannot at this time demonstrate the contrary.

Although the Hearing Examiner considered this, his discussion and conclusion (R. 17-18), that "the best evidence available at this time indicates that the Henault Mining Company would have title to mineral values found in the Homestake formation beneath its claims," emphasize the tenuousness of the technical information on which the geological inference rests in this case and the present uncertainty of Henault's claims. The "best evidence" of which he speaks concedes that "Geologically the problem is too complex to cover adequately in a report of this nature" (R. 17). This factor of present speculation supports the holding of the Secretary.

While the district court states its agreement that geological inference standing alone may not be accepted as a substitute for discovery (R. 144), it is apparent that its result can only be founded on geological inference which rests in turn upon assumption--an inference as to quality and quantity based upon an assumption, rather than proof, that a valuable mineral exists at all. It is equally clear that the court has in fact discarded the requirement that there be actual and physical exposure of mineral-bearing rock in place, possessing

in and of itself a present or prospective value for mining purposes. This is contrary to the applicable principles of law.

C. Even assuming some deposit exists, there was absolutely no showing that it was "valuable." - The entire thrust of the statutes involved and the decided cases is that the deposit must be shown to exist, as we have discussed. Once existence is established, it must then be demonstrated that the deposit is "valuable." Demonstration of "value" is an integral part of the prudent-man standard of determining whether a valid discovery has been made.

In Chrisman v. Miller, 197 U.S. 313, 320 (1905), the Supreme Court ruled that the testimony "does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration." It quoted (at 321) Section 2 of the 1872 Act, supra, and observed that Interior had since laid down the rule of discovery in Castle v. Womble, 19 L.D. 455, 457 (1894), which it approved (at 322). Willingness on the part of the locator to further expend his labor and means was rejected (at 322-323) as a fair criterion of a discovery, as was "a possibility that the ground contained oil sufficient to make it 'chiefly valuable therefor.'" The Court said (at 323) that even where the controversy is between mineral claimants and the rule regarding discovery is more

liberal than where the contest is between mineral and agricultural entrymen or between a mineral claimant and the United States, "there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."[9/]

9/ The Supreme Court thus pointed to the importance of the particular contestants in ascertaining whether a discovery has been made. The subject is relevant to this case in connection with the Secretary's distinction between "exploration" and "development" (R. 43-44). The district court, relying on Lange v. Robinson, 148 Fed. 799 (C.A. 9, 1906); and Charlton v. Kelly, 156 Fed. 433 (C.A. 9, 1907), disagreed (R. 147-149). In neither case did this Court say that the words were synonymous in all situations. Charlton referred to the words as "equivalent" as used by the trial court in a contest between rival mining claimants, citing Chrisman v. Miller, supra. Moreover, as the Secretary observed and as the district court ignores, Henault's own witness recognized the distinction in this case (R. 44-45). The distinction is generally acknowledged. Santa Fe Pacific R. Co. v. United States, 378 F.2d 72, 76 (C.A. 7, 1967); Converse v. Udall, 262 F.Supp. 583, 594-596 (D. Ore. 1966), awaiting decision on appeal (C.A. 9, No. 21697).

That the issues are different in a dispute between mining claimants is beyond question. Neither would deny the existence of the lode or even its value. The issue is usually simply the identity of the discoverer. When the United States contests a mining claim, however, "existence" and "value" are crucial issues. To obliterate the Secretary's distinction and to apply the more relaxed standard of private mining contests to proceedings involving the United States would, we submit, facilitate easy acquisition rights in or title to public property unsupported by any previous judicial or administrative warrant. See the discussion in Davis v. Nelson, 329 F.2d 840, 844-846 (C.A. 9, 1964); Steele v. Tanana Mines R. Co., 148 Fed. 678, 680 (C.A. 9, 1906); Jose v. Houck, 171 F.2d 211, 212 (C.A. 9, 1948); Ranchers Exploration and Development Co. v. Anaconda Co., 248 F.Supp. 708, 714, 719 (D. Utah 1965).

The most recent pronouncement by the Supreme Court to this effect is United States v. Coleman, 390 U.S. 599 (1968). In Coleman, the Court reaffirmed (at 602) the prudent-man standard of determining whether a "discovery" has been made, and said (at 602) that "profitability is an important consideration in applying the prudent-man test * * *." In expressing that standard in 1894 in Castle v. Womble, 19 L.D. 455, the Secretary said (at 457) that "the requirement relating to discovery refers to present facts, and not to the probabilities of the future" and that:

> where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * * 10/

The prudent-man standard has been sustained by this Court on a number of occasions. Palmer v. The Dredge Corp. (Nos. 21435 and 21436, June 26, 1968) not yet reported; White v. Udall (No. 21766, June 17, 1968) not yet reported; Coleman v. United States, 363 F.2d 190, 196-197 (1966), aff'd on reh., 379 F.2d 555 (1967), rev'd on other grounds, United States v. Coleman

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10/ Willingness by the individual mineral claimant to continue, to persist will not suffice. "'[T]he question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. * * *'" Chrisman v. Miller, 197 U.S. 313, 322 (1905).

supra; Mulkern v. Hammitt, 326 F.2d 896, 897 (1964); Adams v. United States, 318 F.2d 861, 870 (1963); Multnomah Mining, Milling & D. Co. v. United States, 211 Fed. 100, 102 (1914); Steele v. Tanana Mines R. Co., 148 Fed. 678, 680 (1906). The standard was applied by this Court (as approved by the Supreme Court in Coleman, supra), in White v. Udall (C.A. 9, No. 21766, June 17, 1968) not yet reported, as against a contention that "the Secretary's decision erroneously applied the prudent-man test by including the requirement that to be a valid mining claim there must be a reasonable prospect that it will be a profitable venture."

In both Udall v. Snyder and Udall v. Garula (C.A. 10, Nos. 9671 and 9681, respectively, May 24, 1968) not yet reported, the trial court had rejected the requirement as an erroneous test of mineral discovery and had deemed the evidence sufficient to overturn the administrative determination of no discovery. The Tenth Circuit reversed summarily, citing United States v. Coleman, 390 U.S. 599 (1968) and in Snyder elucidated:[11/]

11/ Thus, the three cases on which the district court here relied have since been reversed. The opinions of the district court in Snyder and Garula are reported at 267 F.Supp. 110 and 268 F.Supp. 910, respectively.

> The Supreme Court now makes it plain to us that in the case at bar the Secretary applied the approved standard in determining that for want of a valuable mineral deposit no discovery had been made by appellant at the time the land in question was validly withdrawn; that the administrative determination was binding upon the court if supported by substantial evidence on the whole record; that the government witnesses were competent to testify as experts with reference to the prudent man test, and that the Secretary's decision was supported by substantial evidence on the whole record and was not clearly erroneous.

The cases thus make plain that the element of value is essential in ascertaining whether a valid discovery has been made under the prudent-man standard. Here, the evidence is undisputed that the exposed mineralization is valueless. Hence, in applying the prudent-man standard, the Secretary was correct in concluding that Henault had not made a valid discovery.

II

THE SECRETARY'S DECISION RESTED UPON THE CORRECT DISCOVERY STANDARD, WAS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE, AND SHOULD HAVE BEEN AFFIRMED BY THE DISTRICT COURT

The first requirement for a discovery, proof of existence of the mineral, and the second, a showing that it was valuable under the prudent-man standard, were the legal principles applied by the Secretary in this case (R. 38, 43, 46, 50-51). Also, the Secretary carefully reviewed the evidence, set forth above at pages 28-33. A reading of that review demonstrates

that his decision is based on substantial evidence. It was not the function of the district court to reweigh the evidence. It follows, we believe, that the district court erred in reversing the Secretary's decision. "Whether the tract * * * was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, and none was claimed. [Citations omitted.]" Cameron v. United States, 252 U.S. 450, 464 (1920).[12/] See also Davis v. Nelson, 329 F.2d 840, 846 (C.A. 9, 1964); Adams v. United States, 318 F.2d 861, 873 (C.A. 9, 1963); White v. Udall (C.A. 9, No. 21766, June 17, 1968) not yet reported; Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959).

To the extent that the Secretary's decision rested on construction of the mineral statutes, which were committed to him by Congress to administer, and which were here supported by a long history of consistent administrative application, that decision is entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16-18 (1965), and cases cited there. See also Udall v. Battle Mountain Co., 385 F.2d 90, 94-96 (C.A. 9, 1967), cert. den., 390 U.S. 957; Rundle v. Udall, 379 F.2d 112, 113 (C.A. D.C. 1967), cert. den., 389 U.S. 845, adopting the reasons stated in

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12/ As in this Court's recent Palmer v. The Dredge Corp., case (Nos. 21435 and 21436, June 26, 1968) not yet reported, there is at least substantial evidence to support the Secretary's decision even if it is not conclusive.

Bowman v. Udall, 243 F.Supp. 672, 680-683 (D. D.C. 1965), aff'd sub nom. Hinton v. Udall, 364 F.2d 676 (C.A. D.C. 1966). Cf. Udall v. Oelschlaeger, 389 F.2d 974, 976 (C.A. D.C. 1968), cert. den. (S.Ct. No. 1354, June 10, 1968).[13/]

The district court believed that the Secretary's articulation of the standard "goes beyond the test" in considering "reasonable expectation of developing a profitable mine" (R. 149).[14/] That belief is essentially identical to that of appellant's in White v. Udall (C.A. 9, No. 21766, June 17, 1968)

13/ Of course the Secretary was not bound by the Hearing Examiner's views of fact, law, policy, or discretion, as the district court here correctly noted (R. 150, note 17). The Administrative Procedure Act, 5 U.S.C. (1964 ed.) Supp. II, secs. 701-706, did not change the Secretary's ultimate authority as to these matters. Palmer v. The Dredge Corp. (C.A. 9, Nos. 21435 and 21436, June 26, 1968) not yet reported; Standard Oil Co. of California v. United States, 107 F.2d 402, 415 (C.A. 9, 1940), cert. den., 309 U.S. 654; United States v. Standard Oil Co. of California, 20 F.Supp. 427, 447-450 (S.D. Cal. 1937); Henrikson v. Udall, 229 F.Supp. 510, 512 (N.D. Cal. 1964), aff'd, 350 F.2d 949 (C.A. 9, 1965). See F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955); 2 Davis, Administrative Law Treatise (1958) sec. 10.04, pp. 18-26.

14/ The district court's further statement (R. 146), that "the Government has in effect required a showing of commercial value in this," is ambiguous. There has been no requirement in this case beyond that of the relevant statutes and the decided cases. The same charge was made in Udall v. Snyder, 267 F.Supp. 110 (D. Colo. 1967); and Udall v. Garula, 268 F.Supp. 910 (D. Colo. 1967). The Secretary has been sustained in both cases. (C.A. 10, Nos. 9671 and 9681, respectively, May 24, 1968) not yet reported. The aspect of "marketability," also noted by the district court (R. 145, note 12), is simply not involved in this case. The marketability of gold was not in issue. Failure of its occurrence in quantity and quality, with a present or prospective value, was.

not yet reported: "The appellant here contends that the Secretary's decision erroneously applied the prudent-man test by including the requirement that to be a valid mining claim there must be a reasonable prospect that it will be a profitable venture." The reasonable expectation of a "profitable venture" is necessarily embraced in the standard, as the discussed cases show. Citing Henrikson v. Udall, 350 F.2d 949, 950 (C.A. 9, 1965), this Court answered the contention as follows:

> The latest Coleman opinion controls the issues of the instant case in that the Supreme Court approved the standards used here by the Secretary. The proper standards were applied, there is substantial evidence to support the Secretary's decision that there was no valid discovery, and therefore his decision is binding on this court.

That is this case and the result should be the same. See also Palmer v. The Dredge Corp. (C.A. 9, Nos. 21435 and 21436, June 26, 1968) not yet reported.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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JULY 1968

No. 22515

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD TYSK, INDIVIDUALLY AND AS MONTANA STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, AND STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR,

Appellants

v.

HENAULT MINING COMPANY,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR APPELLEE

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CITATIONS

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Statutes Involved

Section 1 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2319, 30 U.S.C. Sec. 22, provides:

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2320, 30 U.S.C. Sec. 23, provides:

> "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other."

Section 4 of The Surface Resources Uses Act of 1955, 69 Stat. 368-369, 30 U.S.C. Sec. 612, provides in part:

> "(a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> "(b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)."

Section 5 of the Surface Resources Uses Act of 1955, 69 Stat. 369, 30 U.S.C. Sec. 613 (a) entitled "Procedure for determining title uncertainties - Notice to mining claimants: publication, service" provides a method whereby the head of a Federal department or agency may institute a summary proceeding, in the nature of a quiet title action, "to determine the validity" and effectiveness of any unpatented mining claim located before the effective date of the Act.

STATEMENT OF THE CASE

This appeal is from a judgment of the Federal District Court for the District of Montana (R. 152-153) in an action brought by the Henault Mining Company, a South Dakota Corporation, appellee, against the Montana State Director of the Bureau of Land Management and the Secretary of Interior, appellants, wherein Henault sought by declaratory judgment,[1]

[1] Federal Declaratory Judgment Act, 28 U.S.C. 2201 et seq.

a judicial review[2] of a final decision of the Secretary of Interior (R. 33-52) and determination of the validity of 18 lode mining claims, owned by the plaintiff Henault, situated in the Black Hills of South Dakota, and under the administrative supervision of the Montana State Director of the Bureau of Land Management (R. 2-63).

In 1960 defendant Montana State Director of the Bureau of Land Management instituted a proceeding, under authority of Section 5 of the Act of The Surface Uses Act,[3] against a group of 21 contiguous lode mining claims located and held by the mining claimant (appellee) prior to 1955. The stated purpose of the proceeding was to establish the right of the Montana State Director to manage and dispose of the vegetative surface resources as provided for by the Act.

Because the claims were located prior to the effective date of the Surface Resources Uses Act, the Bureau sought, by their proceeding, to invalidate those prior locations and thereby subject the ground to the terms of the 1955 Act. The Bureau contested the locations upon the charge that they were invalid for lack of the discovery required by 30 U.S.C. sec. 23. (R 11)

Hearing was had upon the Bureau's sole allegation of lack of valid discovery, and a decision was entered by a Hearing Examiner on July 10, 1964 (R. 11-25) holding that each of the 18 existing locations[4] met the statutory requirements of discovery, (R. 16) and dismissing the Director's proceedings as to 18 claims. (R. 18) Upon appeal by the Bureau of Land Management, this decision was reversed on August 12, 1955, by the Bureau of Land Management in a decision by its Acting Chief of Office of Appeals and Hearings (R. 25-31) and, upon

[2] 5 U.S.C. Sec's 551-559, Administrative Procedure, and 5 U.S.C. Sec's 701-706, Judicial Review. These provisions were referred to in the Action and Judgment in the District Court as 5 U.S.C. Sec's 1001-1009.

[3] 30 U.S.C. Sec's 612 and 613.

[4] The Bureau of Land Management recognized the validity of two of the claims. The Hearing Examiner held one claim invalid and no appeal was ever taken as to that claim.

appeal by mining claimant, the Secretary of Interior, on June 15, 1966, affirmed the decision of its Bureau of Land Management (R. 32-52). The mining claimant thereupon brought its action for declaratory judgment in the Federal District Court below.

Questions Involved

A. The primary issue throughout the entire proceedings leading to this appeal has been and is whether the findings and established facts, set forth in Hearing Examiner's decision and accepted by the Secretary, constitute the "discovery" required by 30 U.S.C. sec. 23 as defined by the Supreme Court and this Circuit Court of Appeals.

B. The secondary issue has been and is whether or not, in a proceeding by the Department of Interior against mining claims under The Surface Resources Uses Act, evidence offered by the mining claimant that the claims are not valuable for timber, grazing or recreation and that the mining claimant holds and regards the claims in good faith for mining property only is material in the determination of the critical issue of discovery.

Findings and Established Facts

The findings and established facts in this case (R. 11-24) were accepted in total by the Secretary (R. 42). For purposes of brevity, but reserving the benefit of any such facts not hereafter mentioned, the following summary of the findings and established facts is submitted:

(1) there is exposed within the limits of each of the eighteen lode claims in question a vein or lode of rock in

place carrying gold and silver, although none of those surface exposures can be mined at a profit. (R 12)

(2) lying within this group of eighteen lode claims, and forming an integral part thereof, are two other lode claims with exposures (of veins carrying gold and silver) which the Secretary of the Interior himself concedes, in effect, can be mined at a profit. (R. 24)

(3) the land upon which the eighteen claims in question is located is mineral in character, is within the oldest, most productive and established gold producing mining districts in the United States, and is surrounded by patented lode mining claims. (R. 12, 22)

(4) these claims lie immediately adjacent to the present working area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit. (R. 12)

(5) these mining claims were the subject of two separate and thorough examinations and detailed studies in 1948 and 1961 conducted and supervised by Lawrence B. Wright of San Francisco, a consulting geologist of excellent reputation and qualifications, formerly employed by the Homestake Mining Company for many years, the last six of which as Chief Geologist, and a recognized authority upon and with an intimate knowledge of the geology and gold deposition of the area in which these claims are located. (R. 13-14)

(6) it was the considered professional opinion of geologist Wright, never challenged by the agency's geologists, that:

(a) the ensemble of gold and silver bearing veins exposed at the surface of these eighteen mining claims

were an upward migration or leak of gold and silver values from substantial deposits below. (R.13)

(b) this ensemble is geologically similar to the ensemble showing at the surface of the adjoining workings of the Homestake Mine which have been observed and are known to continue and lead to the depths at which Homestake produces its ore almost exclusively (R. 22-23)

(c) the geology of the Henault ground is structurally related to that of the Homestake Mining Company's ground and ore deposits in such a manner that the possibility of deep ore deposits such as being developed by Homestake may reasonably be expected at mineable depths at Henault. (R. 13)

(d) these veins, carrying gold and silver, exposed at the surface, can be followed and lead to the valuable ore deposits (such as those of the Homestake Mine) that may reasonably be expected at mineable depths below. (R.23)

(7) Based upon those conclusions, geologist Wright recommends a drilling program of at least three holes to a depth of 3,500 to 4,000 feet to probe for the expected deposits below. The estimated drilling cost in 1962 was $14.50 per foot. (R. 13)

The record of the hearing before Examiner Rampton (TR pp. 190 et seq and R. 23-24) shows that Henault offered evidence, made offers of proof, and submitted proposed findings of fact 10, 11, and 12, in support of the following propositions:

the surface of these claims is not valuable for timber.

the surface of these claims is not valuable for grazing.

the surface of these claims is not valuable for building sites.

the surface of these claims is not valuable for recreation.

the mining claimant in good faith regards these claims as a valuable mining property and have substantiated that belief by the expenditure of over $57,000 for assessment work since 1945.

These factors were not denied by the Bureau, but merely objected to as being immaterial. The Hearing Examiner rejected consideration of these factors (T. 190 et seq.), the Bureau's office of Appeals refused to consider them upon the Bureau's appeal, the Secretary held they were immaterial (R. 51) and the District Court, in concluding that there was a valid discovery upon each of the claims, indicated it was thus not necessary to consider the materiality of such factors.

SUMMARY OF ARGUMENT

Introduction: The issue in the original hearing was the sole assertion by the government that "a discovery of valuable mineral" had not been made within the limits of the unpatented lode mining claims in question. The Hearing Examiner, using the judicially approved "prudent man test" and taking into account the economics of the situation, as set forth in the findings and established facts, concluded that a "discovery", as required by 30 U.S.C. sec. 23, had been made within the limits of each of the claims involved. The Secretary, using an interpretation of "discovery" as "understood and used by the Department" reversed the Hearing Examiner. The District Court held that the correct standard for discovery was the prudent man test and concluded that the application of

that prudent man test in the light of all the findings and established facts accepted by the Secretary constituted discovery within the meaning of the statute and directed the Secretary to so find.

The District Court also held that the "Department test" used by the Secretary was based upon erroneous legal theory and not in accordance with law.

A. The "prudent man test" is the proper guide to determine whether the statutory requirement of discovery has been met.

B. The decision of the Secretary invalidates the locations and was based upon an erroneous theory of discovery and defeats purpose of statute.

C. Evidence of good faith and that mining claims are not valuable for timber, grazing, recreation or building sites should be available for use by a mining claimant in support of discovery.

ARGUMENT

Introduction: An unctuous concern over surface resources and an illusory assurance that the Department's decisions do not invalidate these mining claims or prevent further investment of capital have been constantly prescribed by the authors of those decisions as a palliative for their acceptance and such is the tenor of the Introduction in Appellant's Brief. Lest our silence be mistaken for tacit admission, we submit the following observations:

(1) The only theory upon which the Bureau of Land Management could apply the terms of the Surface Resources Uses Act of 1955 to these mining claims, located before the effective date of the Act, was to invalidate those locations,

thereby depriving the mining claimant of the rights a prior location vests in the locator. Therefore, the Bureau instituted its "quiet title" proceeding against these claims upon the theory and contention that the prior locations were invalid for want of the valid discovery necessary to locate a mining claim under 30 U.S.C. sec. 23.

(2) The precise issue created by the Bureau's proceedings in alleging and attempting to establish that the discovery upon which these prior locations are based is just that - is there a discovery within the limits of each of these claims which meets the requirements of the statute for locating them. And, by admission of its own counsel (R. 92) the "discovery" found by the Hearing Examiner in these proceedings is sufficient for the purpose of the patent applications on these claims which are pending the outcome of this appeal.

(3) If the Department is really sincere about their professed motive in seeking only to manage and control the valuable timber and grazing upon these claims, they are once again informed, as they have been repeatedly since 1960, that this mining claimant stands ready to grant them permission to enter upon the surface of these claims for any legitimate purpose contemplated by the Surface Resources Uses Act.

(4) The Department's persistent and continued efforts, to set aside the original decision of its own Hearing Examiner and of Judge Jameson in the District Court below, and at a well nigh lethal cost to the mining claimant, are certainly not explainable by sanctimonious concern over the surface resources it well knows are non existent!

I.

THE "PRUDENT MAN TEST" IS THE PROPER GUIDE TO DETERMINE WHETHER THE STATUTORY REQUIREMENT OF DISCOVERY HAS BEEN MET.

> "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." *Castle v. Womble*, 19 L.D. 455, 456 (1894).

This is, and will be referred to hereafter, as the "prudent man test" adopted and approved by the Supreme Court in 1905, *Chrisman v. Miller* 197 U.S. 313, 322, and repeated thereafter in *Cole v. Ralph* 252 U.S. 286, 299; *Cameron v. United States*, 252 U.S. 450, 459; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-36; and most recently in *United States v. Coleman;* 390 U.S. 599, 602 (1968); and applied by this Court in *Lang v. Robinson*, 9 Cir., 1906, 148 Fed. 799, 803; *Charlton v. Kelly*, 9 Cir. 1907, 156 Fed. 433, 436; *Cascaden v. Bortolis*, 9 Cir. 1908 162 Fed. 267, 268; *Adams v. United States*, 9 Cir., 1963, 318 F. 2d 861, 870; and most recently in *Converse v. Udall*, (C.A. 9, No. 21, 697, August 19, 1968), not yet reported. In the considered opinions of the original fact finder and of the trial court below, the findings and established facts clearly justify the mining claimant in the further expenditure of from $152,250.00 to $174,000.00 in the deep probing for the paying ore reasonably to be expected at mineable depths below. Even the Department concedes "the claims might be a good gamble for those who can afford to take the chance." (R. 29) That candid observation practically epitomizes the prudent man test.

In his opinion in *U.S. v. Coleman*, supra, at p. 602, Mr. Justice Black pointed out that "the obvious intent (of Congress) was to reward and encourage the discovery of minerals that are valuable in an economic sense." This decision clearly established that the marketability factor ("it must be shown that the mineral can be extracted, removed and marketed at a profit") applies to all locations of mining claims, whether for precious metals, base metals or minerals of widespread occurrence. The findings and established facts before the Hearing Examiner, the Secretary and the District Court below demonstrate, without dispute, that the gold in the paying ore reasonably to be expected at mineable depths below these claims can be extracted, removed and marketed at a profit: the mineral involved is scarce and in dire demand; and the nation's leading gold producer is extracting, removing and marketing this precious metal from a geologically similar structure less than a thousand yards away. These considerations were taken into account by the Hearing Examiner and the District Court. That they were not considered under the title of "marketability test" is not critical - it is sufficient if they were considered under the "economics of the situation. See *Converse v. Udall* (C.A. 9 No. 21 697, at page 10, August 19, 1968,) not yet reported.

The August 1968 decision of this Court in *Converse v. Udall*, supra, at page 5, raises another point of considerable importance - "the finding of some mineral, or even of a vein or lode, is not enough to constitute discovery - their extent and value are also to be considered." It was upon this point that the testimony of witness Wright was so vital in the findings and established facts. Mr. Wright's competent and professional opinion was that the ensemble of veins and structure on the Henault claim was geologically similar to those which existed over at Homestake and which were followed to the depth where Homestake mines and produces its ore. He concluded

that the ensemble of veins on Henault could be similarly followed to mineable depths with a reasonable expectation of the same results that made Homestake the biggest gold producer in the nation. Further than that, Wright's testimony (specifically noted by Judge Jameson below) was that

> "The fact that the values are low at the surface does not or cannot be ruled out as not being important in a situation such as we have here at Henault where there is other evidences of mineralization like hydrothermal alteration, zones that are mineralized with some quartz, pyrite and, maybe, $2 or $3, $5 a ton in gold in some instances. You don't find this kind of thing in many areas, even in the Black Hills. You find no hydrothermal alterations. You find none of these features at all." p. 67 Wright Deposition.

It is to be noted that the situation established in this case is diametrically opposite to that involved in the East Tintic ruling that occupies so much of Appellant's Brief. In East Tintic, the Secretary based his ruling upon the fact that there had not been shown any connection between the surface exposures and deposits "supposed to exist below". It was this decision and language in East Tintic that necessitated and justified the expense of taking Wright's deposition in San Francisco in the preparation for the original hearing before the Hearing Examiner.

Concluding upon this section of our Argument, it is submitted that the proper guide to be used in the determination of the "discovery" involved in this case is the "prudent man test" as defined in the recent decision of the Supreme Court in *U.S. v. Coleman*, supra, and followed by this Court in *Converse v. Udall*, supra, and that under this test thus defined and refined, the accepted findings and established facts before the Bureau of Land Management and Department of the Interior, met the requirements of the statute.

II.

THE DECISION OF THE SECRETARY INVALIDATES THE LOCATIONS AND WAS BASED UPON AN ERRONEOUS THEORY OF DISCOVERY AND DEFEATS PURPOSE OF STATUTE.

A. Invalidation of Location

The eighteen mining claims in question were located prior to 1955. The issue involved throughout the proceedings, from inception to the present appeal, has been whether the findings and established facts offered in support of those prior locations constituted a discovery thereby excluding these claims from the effect of the Surface Resources Uses Act of 1955.

The Secretary's decision was that those accepted facts and circumstances do not constitute the "discovery" required by the statute, 30 U.S.C. sec. 23. The import of the Secretary's decision is clearly demonstrated within the very statute itself:

> "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Without "discovery" there can be no location, and without a prior valid location these claims are subject to the Surface Resources Act of 1955. Appellants assurance that their determination of non-discovery does not invalidate the claims loses its allure in the face of the level observation of the Supreme Court in *Cameron v. United States* (1920) 252 U.S. 450, at page 456:

> "To make the claim valid, or to invest the locator with a right of possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located (Rev. Stats. Sec. 2320***)."

B. Based on Erroneous Theory of Discovery

The Secretary's decision is based upon the theory that the statutory "discovery" requires the mining claimant to actually and physically expose mineral bearing rock in place, possessing in and of itself a present or prospective value for mining purposes.

Appellant cites rulings of the Department in support of this contention. However, there is a significant absence of judicial authority for such a requirement.

As was pointed out by the Hearing Examiner, a determination that the findings and established facts do not constitute a sufficient discovery is tantamount to holding no discovery exists until paying ore is exposed. Yet this is precisely the effect of the subsequent Departmental rulings. The District Court agreed, with the Hearing Examiner, that such rulings were not in accordance with law. Appellant still insists that the exposure must "possess in and of itself a present or prospective value for mining purposes." Such a requirement not only goes far beyond the proper guide as established by the Supreme Court, but has no judicial support whatsoever. It was recently pointed out that the locator is not required to prove he will in fact develop a profitable mine. *Converse v. Udall* (C.A. 9, No. 21,697, at page 10, August 19, 1968). The Appellant's Brief transcends even the contention that the locator must show he will develop a profitable mine - they require the locator to establish that he already has a profitable exposure.

C. Defeats Purpose of Statute

The intent of the mining law is well and often recognized and given considerable weight in the judicial interpretation thereof. The most recent acknowledgement was given in *U.S. v. Coleman*, supra, at page 602:

"The obvious intent was to reward and encourage the

discovery of minerals that are valuable in an economic sense."

That such intent is not unknown to those for whom the Appellant's Brief is written is evident from a published except from a ruling by a former Director of the Bureau of Land Management:

"It is my belief that the major intent of the mining law is to encourage the development of minerals not to hinder that development. In an area where pay ore is ordinarily found only at great depths, it is obvious that even the most enterprising miner must have more than ordinary faith and courage since he must stake his time and money on following evidences of possible mineral which to many would seem no more than mere will o' the wisp. Unless the enterprise of such as these is recognized many valuable deposits are doomed to remain dormant in the depths of the earth of no value to anyone. This is not consistent with the great present day need for the development of minerals in the interest of the National defense and the public welfare. Nor is it, I am persuaded, consistent with the intent of the law." *U.S. v. Arnold, Department of the Interior. Decision Bureau of Land Management* (1954), Contest No. 978, M.S. No. 3373 Mineral, Coeur d' Alene 013984, M: R.L.W.

So too should the rationale of the "prudent man test" be considered in the selection of the proper test of discovery. This was graphically described in the creation of the test:

"For; if as soon as minerals are shown to exist and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the

earth, as Congress must obviously intended the explorers should have proper opportunity to do." *Castle v. Womble* (1894) 19 L.D. 455, 457.

The decision for the Secretary requires, as a prelude to a possible concession of valid discovery, this mining claimant to embark upon the recommended program of probing for the valuable ore deposits reasonably to be expected at mineable depths below. It is conceded that this would involve an expenditure of capital estimated from $152,250.00 to $174,000.00. Can it be seriously believed that anyone is going to embark upon capital outlay of that magnitude without the assurance that its locations are supported by the "discovery" which guarantee him that during and after such an undertaking the land will not be subject to other disposition. That requirement is not only legally unsupportable, but would also constitute a departmental fiat, inadvertent as it must surely be, that couldn't be better designed to smother forever the priceless initiative of private industry in the search for and development of the metals upon which our continued existence so vitally depends.

III.

EVIDENCE OF GOOD FAITH AND THAT MINING CLAIMS ARE NOT VALUABLE FOR TIMBER, GRAZING, RECREATION OR BUILDING SITES SHOULD BE AVAILABLE FOR USE BY A MINING CLAIMANT IN SUPPORT OF DISCOVERY.

The Bureau never deigned to attempt a proper showing that there existed in fact upon these claims the commercial timber and grazing resources which is the subject of the Surface Resources Uses Act upon which they based their proceedings. And to one having first hand knowledge of the claims such restraint is readily understandable. The Bureau's efforts in this connection were concerned with preventing the mining

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APPELLEE'S BRIEF

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant JOHN LEE ARNOLD was indicted by the Federal Grand Jury for the Central District of California on November 30, 1966 [C. T. 2, 3]. 1/ The indictment was in two counts and charged the defendant with robbery of the United California Bank, Wilshire-Catalina Office, on October 5, 1966, and the robbery of the Mission National Bank of Los Angeles on October 11, 1966 [C. T. 2, 3]. The count involving Mission National Bank included a charge that the defendant forced an

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1/ C. T. refers to Clerk's Transcript.

individual in the bank to accompany him without his consent. Arnold was arraigned on July 31, 1967, before the Honorable William P. Gray, United States District Judge [C. T. 5]. On July 1, 1967, the court appointed Mario Gonzalez as counsel for the defendant, the defendant pleaded not guilty as charged in both counts and the case was transferred for all further proceedings to the calendar of the Honorable Judge Albert Lee Stephens, Jr., United States District Judge [C. T. 5].

On September 19, 1967, the defendant moved to discharge his attorney as his counsel of record and the court granted the motion and relieved Mr. Gonzalez [C. T. 12].

On the same date, September 19, 1967, a jury trial commenced in the courtroom of Judge Stephens [C. T. 12]. On September 20, 1967, the jury returned with a verdict of guilty on both counts [C. T. 13-15].

On October 31, 1967, the court ordered the defendant committed to the custody of the Attorney General for a period of 21 years on count one, and 21 years on count two, with the sentence on count two to run concurrently with count one [C. T. 17]. On October 31, 1967, the defendant filed his notice of appeal to the United States Court of Appeals for the Ninth Circuit [C. T. 19].

On March 19, 1968, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the court corrected the initial sentence from 21 years to 20 years on both counts [C. T. 20, 21].

II

STATEMENT OF FACTS

On October 5, 1966, the defendant entered the United California Bank, Wilshire-Catalina Office, 3343 Wilshire Boulevard, Los Angeles, California [R. T. 77, 79]. 2/ He approached the teller window of Miss Jo Bushman and placed a demand note on the counter [R. T. 78]. It read, "Put all the money in the bag. Try to be funny and I will blow your guts out. All the money." [R. T. 78]. After reading the note, Miss Bushman took money from her cash drawer and placed it on the counter [R. T. 79]. Defendant grabbed the money and left the main entrance of the bank out onto Wilshire Boulevard [R. T. 80]. The audit revealed a loss to the bank in the sum of $1,960.00 [R. T. 119].

About six days after the first bank robbery of October 5, 1966, the defendant entered another bank, on Wilshire Boulevard on October 11, 1966 [R. T. 132]. The institution was the Mission National Bank of Los Angeles, located at 3143 Wilshire Boulevard [R. T. 128]. At approximately 2:00 P. M., the defendant approached the teller window of Miss Anne-Lise Espegren and demanded money of her [R. T. 131-132]. At this time the Assistant Cashier, Mr. Hector Mokhtarian, also approached the teller via the customer area, stood close to the defendant, and inquired if there was any problem [R. T. 131].

2/ R. T. refers to Reporter's Transcript.

The defendant then threatened Mr. Mokhtarian and ordered him to instruct the teller to give him her money or he would kill both of them [R. T. 131]. Mr. Mokhtarian, in fear, told the teller to place the money from her cash drawer onto the counter [R. T. 132]. She complied and defendant grabbed the money, approximately $1,386.00 [R. T. 138]. The defendant then turned to Mr. Mokhtarian and said, "You are coming with me." [R. T. 133]. The defendant then forced Mr. Mokhtarian to walk slowly ahead of him from the teller window to the inside entrance of the bank on Wilshire [R. T. 133-134]. At this point, the defendant ordered Mr. Mokhtarian to turn right, remaining inside the bank, and then he himself fled in an easterly direction on Wilshire Boulevard in the vicinity of Bullock's Wilshire [R. T. 135-136]. He entered a Corvair automobile that he had purchased and paid for in cash the day after the first bank robbery [R. T. 180-183], and then drove off at a high rate of speed [R. T. 137].

III

ARGUMENT

A. THE DEFENDANT MADE AN INTELLIGENT AND COMPETENT WAIVER OF HIS CONSTITUTIONAL RIGHT TO COUNSEL

The defendant contends that he did not make an intelligent and competent waiver at trial of his constitutional right to counsel [App. Br. 7-10]. This Honorable Court has been faced with this contention on prior occasions and has outlined certain principles of law which are directly applicable to the instant case.

The first principle was clearly enunciated by this Court in Duke v. United States, 255 F. 2d 721 (9 Cir. 1958), cert. den. 357 U.S. 920, 78 S.Ct. 1361, 2 L.Ed. 1365 (1958). It is the simple proposition that ". . . an accused has an unquestioned right to defend himself." Duke v. United States, supra, at p. 724. The Court made specific reference to 28 U.S.C. §1654:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. . . ."

A second principle is that " . . . an accused should never have counsel not of his choice forced upon him." Duke v. United States, supra, p. 724. As the Supreme Court of the United States has phrased it:

> "The Constitution does not force a lawyer upon a defendant."

Adams v. United States, ex rel. McCann,

317 U.S. 269, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942).

The third principle is that an accused may thus waive a right to counsel. Watts v. United States, 273 F.2d 10 (9 Cir. 1959). Or as stated by Circuit Judge Lumbard of the Second Circuit:

> " . . . The petitioner contends that he could not have had a fair trial because, as a mental defective, he was not able intelligently to defend himself. It is true that the mental inadequacy of the accused may necessitate the appointment of counsel in order to satisfy the requirements of due process. Palmer v. Ashe, 1951, 342 U.S. 134, 72 S.Ct. 191, 96 L.Ed. 154. But it is equally true that when the right to counsel is explained and an offer to appoint counsel is made, a competent defendant may refuse the offer and thereby waive the right to have counsel appointed."
> United States v. Cummings, 233 F.2d 190, 194 (2 Cir. 1956).

See also Adams v. United States, ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942); Lipscomb v. United States, 209 F.2d 831 (8 Cir. 1954), cert. den. 347 U.S. 902, 74 S.Ct. 711, 98 L.Ed. 1105 (1954); Hanes v. United States, 203 F.2d 561 (4 Cir. 1953); Smith v. United States, 216 F.2d 724 (5 Cir. 1954).

"When he takes such steps voluntarily and intelligently," as this Court has held, "he will not later be heard to complain that his Sixth Amendment rights have been impaired. Johnson v. Zerbst, 1938, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461; Michener v. Johnston, 9 Cir. 1944, 141 F.2d 171, 174-175." Watts v. United States, supra, p. 12.

In the case at bar, the trial judge took every effort to insure an intelligible and competent waiver. The court advised the defendant of the seriousness of the charge [R.T. 5, lines 18, 19]. The court informed the defendant that the court-appointed lawyer, Mario Gonzalez, was an " . . . experienced lawyer, and could undoubtedly be of assistance to you, and he is willing" [R.T. p. 6, lines 1, 2], and that "There is no substitute for the experience that lawyers have in these matters." [R.T. 9, lines 13-14.]

The court made it clear that despite defendant's past record, he was on trial solely on the charges in the indictment [R.T. 8, lines 2, 7], but that if he chose to testify on his own behalf the fact of his prior felony could be brought to the attention of the court [p. 8, lines 23-25, p. 9, line 1].

As stated in Watts v. United States, supra, p. 12:

"The trial judge explained to him the responsibilities incurred by a defendant

who represents himself, but he would not be deterred."

And in the instant case, the defendant would not be deterred. He had prepared himself by studying law in prison. As the defendant himself stated, " . . . In the last year I have studied almost everything that I can find. I have law books in my cell in Leavenworth. I spend all my time continuously studying those." [R. T. 5, lines 5-6]. The defendant wanted to " . . . Present my own case to the jury." [R. T. 7, lines 20-21]. And as the defendant stated " . . . Regardless of what the consequence is, and to my own self, I would think that maybe I could have done something that he [attorney Gonzalez] didn't." [R. T. 9, lines 23-25].

The defendant had no quarrel with his appointed counsel, but simply wanted to defend the case himself [R. T. 11, lines 4-5]. As the defendant stated, "Mr. Gonzalez has been very nice. He has been over to see me various times. I don't know exact times, but he has been over numerous times. I don't know how many." [R. T. 10, lines 10-13].

The record further reflects, in the words of the defendant, that the court-appointed attorney had to persuade the defendant not to waive counsel. "I thank Mr. Gonzalez for all his treatment he gave me. He has been extremely nice, and he has tried his best to convince me that I should go with the counsel, that he would do the best for me." [R. T. 11, lines 6-9].

But the persuasion of the court and appointed counsel were to no avail and defendant went to trial, defending himself.

The conduct of the trial further reflects that defendant was no stranger to the procedures of court. As an example, with no prompting, he initially requested the exclusion of all witnesses not presently testifying [R. T. 13, lines 13-17].

Every effort was made to assist the defendant by both court and prosecutor. A copy of a witness' statement was furnished to the defendant in order to assist him in his cross-examination [R. T. 81]. A review of defendant's cross-examination of the witness revealed his ability to use the statement [R. T. 81-96].

In connection with the jury instructions, the trial judge furnished the defendant with a copy of Mathes and Devitt's book [R. T. 224]. The court then took considerable time in explaining each of the instructions to the defendant [R. T. 224-238].

Considering the entire record, it is abundantly clear that defendant has in no way met the burden of showing that his waiver of counsel was not intelligently made.

As stated by this Court:

> "The burden of proof in showing that a waiver of counsel was not intelligently made rests upon the party contesting the validity of the waiver. See Johnson v. Zerbst, supra, 304 U.S. at pages 468-469, 58 S. Ct. 1019; Michener v. Johnston, supra, 141 F. 2d at page

175; cf. Wilken v. Squier, 1957, 50 Wash. 2d 58, 309 P. 2d 746. Appellant has not met this burden."

Watts v. United States, supra, p. 12.

B. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DISMISSAL OF A PORTION OF THE INDICTMENT, NOR IN NOT ADVISING DEFENDANT OF A RIGHT TO PLEAD NOT GUILTY BY REASON OF INSANITY

On the first day of trial, upon first hearing that the defendant was going to waive his right to counsel, the Government informed the court that the death penalty would not be requested [R. T. 6, lines 12-17]. The Government then moved the court to dismiss that portion of Count Two of the indictment relating to kidnapping [R. T. 17].

The court denied the motion [R. T. 18], and now the defendant alleges this denial as error. The defendant, however, fails in his brief to mention how in any way he was prejudiced by the court's ruling. An examination of the record furthermore reveals no such prejudice. The ruling was one within the sound discretion of the court.

In addition, the defendant claims that the court erred in not advising him of a possible insanity defense. Even assuming such an obligation on the part of the trial court, an examination of the record of trial reveals absolutely no intimation of such defense, either from the defendant or his counsel prior to his

being relieved by the court. Even the clinical record appended by the defendant to his brief indicates competency. What the record does reflect, however, is that the trial judge, prior to sentencing, requested and received from the medical authorities at Terminal Island, a report indicating the defendant to be in "satisfactory mental condition." [R. T. 298, lines 12-17].

CONCLUSION

For the reasons stated above, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577A, 22578 A-C

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

AMERICAN PIPE AND CONSTRUCTION CO.,

Appellant,

vs.

THE STATE OF CALIFORNIA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE: NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT OF CALIFORNIA, WESTERN DISTRICT OF WASHINGTON, AND DISTRICT OF OREGON

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

JURISDICTION

This Court has jurisdiction of this proceeding under 28 U.S.C. § 1651 (a) and under this Court's order of February 5, 1968 consolidating cases and directing that these proceedings "shall be considered in the nature of mandamus."[1]

*As these proceedings are "in the nature of mandamus" the parties are technically Petitioner and Respondents. Respondents, however, for the sake of consistency, will refer to the parties herein as Appellant and Appellees.

[1]The briefs filed upon Appellant's motion for a stay fully argued the "collateral appeal" doctrine. Appellees assume that the order entered herein on February 5, 1968 has decided that issue. Appellees concur in the determination of this court that it may consider the abortive attempt to appeal as a proceeding in mandamus and hence appellees propose no argument upon points III and IV of appellant's brief.

COUNTER STATEMENT OF THE CASE

Twenty-seven "Pipe Cases" have been pending in five separate district courts of this Circuit for three years or more. The plaintiffs include three states and approximately 150 state agencies, cities, counties and other municipal corporations. Their claims against defendant are for damages resulting from alleged price fixing and other violations of the antitrust laws. Some 2200 purchase transactions with defendant will be involved in the proof of conspiracy and damage.

Pursuant to 28 U.S.C. § 292 (b) the Chief Judge of this Circuit designated Judge Martin Pence "to hold a district court" in each of the districts in which the "Pipe Cases" were filed.[2] 28 U.S.C. § 137, provides that:

> "The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."

Judge Pence undertook the responsibility for all twenty-seven cases in all the districts under that statute.[3]

No one except Appellant has ever assumed that the initial assignment of cases to Judge Pence was irrevocable or no longer subject to the rules or or-

---

[2]Judge Pence may also have been designated to hold a district court in still other districts; and there are "Pipe Cases" in other circuits.

[3]Appellant repeatedly states that the cases were assigned to Judge Pence "for all further proceedings" by the Chief Judge of each district. There is no authority whatsoever in the record for any such assertion. The record shows only a handful of orders, mostly relating to dismissed cases, a clerk's notation on the docket and a memorandum from Judge Boldt, who is not the chief judge of the district in which he is a judge. Appellees presume that Judge Pence acquired responsibility for the pipe cases as the statute provides in "accordance with the rules and orders" of the respective District Courts.

ders of the district courts as provided by statute. Appellant now concedes that it has no vested right to have Judge Pence try all cases—concededly an impossible task—and it is thus obvious that the cases may be re-transferred or re-assigned by any lawful procedure.

In November of 1966 Judge Pence first advanced the idea of conducting three "practically simultaneous trials" in Seattle, San Francisco and Los Angeles. After extensive pretrial hearings and argument, that concept was formalized in pretrial order No. 9 entered February 21, 1967. In giving content to that idea, Judge Pence has for the last sixteen months mentioned Judges Boldt and Zirpoli as having expressed willingness to try other cases and willingness to meet for the purposes of coordinating the trials of the cases. The manifest purpose of such a meeting was to avoid unnecessary delay and conflicts in rulings, and to coordinate the appearance of witnesses and parties, as well as to deal with all of the other problems that might arise from lack of careful and deliberate attention to multidistrict cases.

That concept in subsequent orders embodying the identical or similar terms, excepting only dates, was carried forward through pretrial order No. 12[4] and pretrial order No. 14. On February 5, 1968, this court ordered that the appeal taken from the entry of pretrial order No. 14 be considered "in the nature

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[4]Appellant sought leave to file a petition for a writ of mandamus against that order (Ninth Circuit Cause No. 22336). The motion was opposed and denied by this court on December 1, 1967, and application for reconsideration denied by this court on January 9, 1968. The Brief of respondent in that proceeding should be deemed incorporated herein to the extent that it shows appellant does not have the legal rights asserted and that there is no basis for issuance of a writ.

of mandamus", that pretrial proceedings in the cases below could continue and deferred consideration upon "respondents' [appellees'] motion to dismiss."

On February 23, 1968, Judge Pence adopted pretrial order No. 15, which provides in material part:

> 26. A pre-trial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonzo Zirpoli (N. D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:
>
> (A) The *voir dire* examination;
>
> (B) The form of a sumary to be read to the jury to explain the contentions of the parties and the issues;
>
> (C) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

(D) Jury instructions and special interrogatories;
(E) Counsel's opening statements;
(F) The days and hours of the week during which court will be conducted;
(G) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;
(H) Daily trial transcripts;
(I) A current index of the trial record;
(J) The handling of documentary evidence at trial;
(K) The scope of testimony of witnesses to be called at trial and possible limitations with respect thereto;
(L) The use of depositions, including possible use of narrative summaries or verbatim extracts;
(M) The parties' report on their attempts to stipulate as to facts;
(N) Further pre-trial proceedings;
(O) Rulings on objections to designated deposition testimony and documentary evidence, where possible.
(P) Possibility of settlement.

Pretrial order No. 15 has considerably clarified and made more explicit a fair and orderly procedure which has been implicit and known to the parties for over a year.

The new order defines the concept and limits of "practically simultaneous trials" to one of "overlapping trials . . . to commence . . . at intervals of not less than two weeks each," set in such a manner "as will permit the orderly processing" of all cases set for trial.

The new order makes perfectly clear that Judge Pence did not contemplate nor did Judges Boldt and Zirpoli propose to constitute themselves some three-judge constitutional court. Thus, the pretrial con-

ference is now set "before Judge Pence" and the other two judges will be "present" rather than having all three "preside." The cases to be tried will now be selected by Judge Pence rather than the three "trial judges" and thereafter there will be "such action as is necessary for transfer or assignment of the designated cases to the other judges for trial.[5]

ISSUE PRESENTED

1. Should Appellees' motion to dismiss be granted on the grounds that:

a. Appellant has shown no basis for granting the extraordinary relief requested, or

b. The challenged order is now moot.

2. May district judges set three cases for trial within such districts after they are ready for trial, after a hearing to determine trial times "as will permit the orderly processing" of the cases where the commencement of any of the trials must follow the commencement of any other trial by at least two weeks and no more than three cases in five districts will be so set for trial.

ARGUMENT

1. *Appellant's Motion to Dismiss should be granted.*

a. Appellant has in this proceeding retreated from the position maintained in the earlier mandamus proceeding. It no longer claims a constitu-

[5]No action is known to be required other than a minute entry or order signed by the judges concerned. While appellant concedes it has no "vested" right to have Judge Pence try all of the cases, it has suggested no possible way to avoid that result.

tional right to have a single lawyer represent it in all cases. Appellant now concedes the issue to be simply one of difficulty imposed upon any litigant and the courts where there is multi-district litigation involving numerous parties, with the possibility of over-lapping trials.

Although appellant presents the difficulties of the case as being the defendant's alone, the trial court and the parties themselves have always recognized that these difficulties are problems with which trial counsel for all parties are faced. During a pretrial conference concerning pretrial order No. 9, counsel for appellees succinctly expressed the effect of the court's order:

> "We know that under Pretrial No. 9, everybody's feet are going to be on the fire, our feet and Mr. Jansen's feet.
>
> "Mr. Jansen: The hotter you make it the better I like it." (App. 266)

As Judge Pence accurately stated the legal problem, the question of trial of the Pipe Cases required him to determine a

> "way in which these cases could be handled (1) with fairness to the plaintiffs and (2) fairness to the defendants and (3) fairness to the public." (App. 272)

Appellant has not shown any problem affecting its substantial rights nor any problem of trial different in degree or kind than that faced by appellees' counsel.[6]

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[6]Indeed, appellees' problems in overlapping trials would seem more severe since the plaintiff must present his case first. Appellant continues to argue on what can only be called a reckless disregard for the facts, e.g., appellant's "single economic expert" opposed to "appellees' battery of experts." (App. Br. p. 15). Much of the pretrial conference during the past week was taken up with expert testimony. Appellant has a computer of its own and has at least as many expert wit-

More significantly, appellant has neither demonstrated nor claimed the existence of any problem which does not invariably exist whenever a party is faced with simultaneous or over-lapping trials in different districts. The Record, on the other hand, shows that Judge Pence proposes a plan which will alleviate these problems.

b. Whether or not considered as an appeal from the entry of or a petition for a writ of mandamus against carrying out pretrial order No. 14, the basis for invoking this Court's jurisdiction is no longer in existence. Appellees do not, however, urge that these proceedings be terminated for that reason. This is appellant's fourth submission to this court for relief from any possibility of having more than one case set for trial. In appellees' view, this issue was concluded by the Court's denial of leave to file a petition for writ of mandamus, but appellees must conclude that appellant will again appeal or seek a writ of mandamus or prohibition on account of the entry of pretrial order No. 15, which embodies the same concept.

Appellees submit that this Court should indicate that problems of trial setting and procedure are matters for the trial court, and that this Court will

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nesses on this case as do appellees.

Appellant formerly had a firm of attorneys representing it, but by virtue of pretrial proceedings, hired present counsel to supervise that firm's work and then found it possible, counsel says, to dispense with the previously hired firm and retain present counsel in the interest of saving half a million dollars a year.

Whether or not there are simultaneous, overlapping or successive trials the document problem will be the same—copies must be produced for introduction in each case where they are relevant—and will bear equally on appellees and appellant. The present plans contemplate minimizing this problem—see pretrial order No. 15, supra pp. 4-5.

not entertain continued attempts directed toward delay and interference with the efforts of the trial court to solve a difficult procedural problem in a fair and orderly manner. This is particularly true where, as here, the trial court has exercised as much care and patience in the solution of these problems as the Record indicates.

Costs and expenses incurred in these proceedings should be awarded to appellees.

2. *The concept of overlapping trials underlying the pretrial order may properly be applied by district courts.*

Appellant
~~Appellees~~ concedes:

> "If *coincidentally,* all [27 cases] had proceeded to trial simultaneously, appellant would not be in this Court seeking relief."
> (Br. of App., p. 12). (Emphasis by Appellant)

Appellees cannot conceive how appellant can ask for relief by this Court from an order limiting its exposure to three staggered trials separated by at least two weeks rather than to 27 simultaneous trials in five districts. No one could conceivably claim that these cases could all be tried separately, without considerable overlapping. Appellant urges bizarre and inconsistent notions. It says that simultaneous trials *by coincidence* would provide no basis for complaint. Nevertheless, appellant says, simultaneous or overlapping trials pursuant to a plan designed to eliminate as many logistic and procedural problems as possible is, somehow, prejudicial.

What appellants are attacking is a plan which would alleviate the very problems it poses and which at the same time, would permit the district courts to operate and dispose of this litigation in

an orderly and fair manner. Appellant's brief is simply an invitation to this Court to issue a declaratory judgement of its own views on disposition of this protracted litigation.[7] This Court, we submit, does not have sufficient information to do this; and we doubt whether the Court has either the power or inclination to do so.

There is no novelty in simultaneous trials, practically simultaneous trials or overlapping trials involving ordinary cases or, in large, multi-district antitrust cases. In the electrical cases, for instance, between September 18th and December 16, 1964, there were at least two and as many as four cases going on simultaneously in district courts in Missouri, Texas, California and Washington (see table annexed hereto as Exhibit "A"). Two cases were being tried simultaneously in district courts in New York and California between March 1st and March 10, 1965, and five days after conclusion of one case in New York another case commenced in Washington.

CONCLUSION

For some fourteen months appellant has raised every conceivable argument under every conceivable procedure and guise in the court below and in this Court to prevent any cases being set for trial. None of the issues raised have been in any realistic sense an actual situation, case or controversy. All have necessarily involved the assumption by appellant of presumed error, presumed prejudice, and assumed impossibility of conducting a fair trial in the light of appellant's forecast of the treatment to be accorded it.

---

[7]Appellant itself pointed out that the procedures followed to date have saved it $500,000.00 per year (App. 247).

All of the hypothetical situations raised are clearly necessarily and properly within the discretion of district court judges in the conduct of their business—the disposition of causes by trial.

Appellant's chief concern is apparently that it might have to settle the cases because of a deliberately planned sequence of three overlapping trials. Since appellant concedes it would not be in this court if by coincidence it was facing 27 simultaneous trials, appellees cannot see how appellant has been prejudiced by the pretrial procedure adopted and indeed feels that there is given a clear advantage to appellant in eliminating that hazard.

Settlement has always been the last item on the agenda of the final pretrial conference. It is certainly true that the imminence of a trial or trials will force both parties to examine their positions with care and consider a reasonable settlement. It is, nevertheless, also true that parties to litigation sometimes use the costs and delay inherent in legal procedures to defer settlement consideration and make the law itself a settlement tactic—the familiar "courthouse step" settlement. It is also true that trials are frequently necessary and indeed the only solution to controversies which remain after reasonable people are unable to compose their differences. In any event, the possibility of settlement or its alternative both require that this Court permit the district courts to proceed as they have indicated with a reasonable and lawful method of disposing of this litigation in a manner no different from that which could be adopted in any litigation—the difference, if any, being in careful planning for appellant's benefit to avoid problems which might other-

wise fall upon appellant if the trials were left to happenstance.

The district courts, appellees, this Court and appellant should all be assured that these cases may and will move forward to trial and disposition, including overlapping trials if deemed necessary by the trial courts. Error and prejudice should not be presumed in advance of any trial. If error and prejudice should be suffered by either appellant or appellees it can and will be redressed upon appeal. Only on appeal, can any claim of error have a defined scope, context or meaningful analysis.

Appellant should know that it must be prepared for at least three overlapping trials, now deferred for at least three months. *Appellant has known this for some sixteen months and now has at least another three months to prepare for that eventuality.*

Appellant should know that the deliberate planning is for its benefit as much as for anyone else, and that the monetary savings it has achieved of over half a million dollars a year cannot be expected to continue forever.

Appellant's position is topsy turvy. It objects to a three judge meeting to plan a limited number of trials with the elimination of all possible trial problems because it is deliberate while conceding it could have no complaint if chance resulted in the very problems that the judges are seeking to solve. Appellee's chief concern here is that this Court should permit the district courts to dispose of this litigation by a reasonable method.

There must be an end to fruitless, bootless and essentially frivolous requests to this court for intervention in the setting for trial and trials of these cases by the courts below.

This proceeding should be dismissed and appellees awarded their costs and attorney fees with leave to apply to the courts below for a determination of damages for delay caused by these proceedings. Appellant's objection to the setting of cases for either "practically simultaneous" trial or for "overlapping trial" was and is frivolous, wanting in merit and manifestly taken for purposes of delay.

DATED at Seattle, Washington, this 23rd day of February, 1968.

Respectfully submitted

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CERTIFICATE

I certify that, in the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD MCL. DAVIDSON

TRIALS OF ELECTRICAL CASES

Start	*Stop*	*District*	*Docket Number*
3/16/64	6/2/64	E.D. Pa.	30015
9/18/64	15/5/64	W.D. Mo.	13290-3
9/8/64	12/17/64 & 15 others	W.D. Tex.	3064
10/6/64	12/16/66	Dist. of Col.	348-62
10/29/64	11/24/64	W.D. of Wash.	5271
2/16/65	4/21/65	S.D. N.Y.	62E-695
3/1/65	3/10/65	N.D. Cal.	8381
4/26/65	5/3/65	W.D. of Wash.	5385 & related
5/2/66	5/4/66	N.D. Ill.	61C-1278 & 16 related

Exhibit A

Nos. 22541 A-G, 22574, 22575, 22576 A-L,
22577A, 22578 A-C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN PIPE AND CONSTRUCTION CO.,

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Appellees.

On Appeal From the United States District Courts for The: Northern District of California, Central District of California, Southern District of California, Western District of Washington, and District of Oregon.

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three "trial judges" would make substantive rulings affecting all of the trials (App. pp. 121-122).[1]

The District Courts had jurisdiction pursuant to 15 U.S.C. §15. Notices of Appeal in these cases were filed by appellant on December 26, 1967. On February 5, 1968, this Court filed its order consolidating these cases "for hearing under one record for the purpose of briefing, argument if called for, and submission." On the same day, this Court filed its order that "this proceeding shall be considered in the nature of mandamus" and that "respondents' motion to dismiss . . . shall be and is passed for consideration until the proceedings are submitted on the merits . . .".

This Court has jurisdiction to review the order appealed from under both 28 U.S.C. §1291 and the All Writs Act, 28 U.S.C. §1651(a).[2]

Beginning in 1964, separate treble damage antitrust cases were filed in five Districts by some 150 plaintiffs (most of which are states, municipalities and other public agencies) asserting claims against appel-

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[1]In view of the accelerated briefing schedule established by this Court in these matters, the entire record on appeal has not been filed with the clerk of this Court in accordance with the provisions of Rule 10. For the convenience of the Court, appellant has prepared and files herewith an appendix to this brief containing all of the documents from the courts below which it considers relevant to the issues involved in these appeals. References to this appendix are stated thusly: "App. pp. .....".

[2]On October 30, 1967, to seek review of an earlier order similar in form, but different in dates fixed for its execution, appellant filed with this Court a motion for leave to file a petition for a writ of mandamus (No. 22336), and after denial of this motion by this Court on December 1, 1967, subsequently, on December 26, 1967, filed an application for reconsideration which was denied by this Court on January 9, 1968. For this reason occasional reference may be made to Case No. 22336.

lant American Pipe and Construction Co. and others.[3] The complaints, all of which were substantially identical in form, charged that the defendants had violated Section 1 of the Sherman Act (15 U.S.C. §1) by allocating and dividing orders and territories, and submitting "collusive and rigged bids" for the sale of concrete and steel pipe (See, for example, App. 1-13).

Appellees contend that there was a single conspiracy which encompassed a ten state area—California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii. American vigorously denies that it participated in any conspiracy, but, assuming *arguendo* the existence of a conspiracy, asserts that there were separate arrangements involving differing areas, times, products and parties (App. pp. 190-198).

Since the early stages of this multiple litigation all of the cases were channeled by the Chief Judge of this Court and by the Chief Judges of the various districts involved to Judge Martin Pence, Chief Judge, District of Hawaii. The four government cases (not involved in these appeals), were filed on June 23, 1964 in the Central District (formerly Southern District, Central Division) of California. They were consolidated with other cases (not involved in these appeals) on July 20, 1964. On December 9, 1964, Judge Pence was designated by the Chief Judge of this Court to sit in the Southern District (now Central District) of California. On December 18, 1964, the cases referred to above

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[3]All of the other defendants—United States Steel Corp., Kaiser Steel Corp., United Concrete Pipe Corp., Martin-Marietta Corporation, and U.S. Industries, Inc.—settled out of court with the plaintiffs shortly after the court below first announced that it intended to order simultaneous trials.

were transferred by Judge Westover of that District to Judge Pence for all further proceedings therein. Shortly thereafter, some of the cases below were filed in the Northern District of California. On December 9, 1964, the Chief Judge of this Court designated Judge Pence to sit in the Northern District of California and, on December 15, 1964, the cases pending there were assigned by the Chief Judge of that District to Judge Pence "for all further proceedings." Later, as cases were filed in the Western District of Washington and the District of Oregon, Judge Pence was designated by the Chief Judge of this Court to sit in those Districts and almost simultaneously the Chief Judges of those Districts assigned the cases there pending to Judge Pence (App. pp. 22-32). Judge Pence began the task of assuming the responsibility for "all Western Concrete and Steel Pipe Antitrust Cases" early in 1965. In his letter dated February 19, 1965, to "all counsel", he stated

> "* * * it appears to this Court that a great amount of the discovery aimed at developing the defendants' alleged conspiracies is overlapping, intertwined, has relevancy to almost all actions, and wherever this is true, should be conducted by and on behalf of all plaintiffs and defendants at one and the same time. * * *." (App. pp. 241-243).

Judge Pence followed this letter by conducting pre-trial conferences on March 11 and 12 and on May 27 and 28, 1965, culminating in Pre-Trial Order No. 1 (App. pp. 33-58).

Since February 19, 1965, Judge Pence has closely supervised and coordinated all proceedings in the Pipe Cases. Although Pre-Trial Order No. 1 expressly purported not to consolidate the cases "for trial or for any

purpose", pre-trial discovery procedures were ordered and carried out on a joint basis from the very beginning of Judge Pence's assignment to the cases. Previous interrogatories, motions for the production of documents and notices of depositions filed by any party were ordered withdrawn. Motions, and briefs thereof, directed to the complaints in the various actions were ordered filed on single dates specified and counsel were requested "insofar as feasible * * * to unite in common briefs * * *". A schedule of discovery was ordered. A joint motion by plaintiffs for production, joint interrogatories by plaintiffs to defendants, joint "transaction" interrogatories by defendants to plaintiffs, joint production by defendants, and many other joint activities (as to plaintiffs on the one hand and as to defendants on the other) were ordered by Judge Pence. Pleadings, motions, briefs, notices, orders and other documents "applicable to all of the causes" were prepared as one single paper "made applicable to all of the causes" and as to each separate District carried only "the file cause name and number of the lowest numbered" of the causes there (App. p. 35).

Depositions were ordered taken by plaintiffs and by defendants on a joint basis. This order was carried out by plaintiffs and, until appellant remained as the sole defendant, by defendants. A joint trial brief has been filed by plaintffs and, except as to plaintiff Washington Public Power Supply System, all plaintiffs have joined together in a single "compact" employing a single firm of attorneys as special counsel, jointly paying all expenses of litigation and jointly agreeing to divide the proceeds of all of the cases regardless of the outcome of any single case (App. pp. 97-113).

When the subject of trial settings first arose, counsel for appellees suggested the selection of four "bellwether cases" to be tried in sequence. In October, 1966, Judge Pence established a tentative trial plan which contemplated four trials with reasonable respites of from 60 to 90 days between each one.

The first suggestion for three simultaneous trials is found in Judge Pence's letter dated November 28, 1966, in which he states:

> "Mr. Cooper [Judge Pence's administrative assistant] has written you concerning the proposed agenda for the December 14 conference. The possible revision that I am considering is that of scheduling all discovery in *all* cases to be carried on simultaneously and then holding practically simultaneous trials in Seattle—with Judge Boldt sitting —San Francisco—with Judge Zirpoli sitting, and in Los Angeles—with myself sitting—sometime around October 1967. If this procedure is followed, it is anticipated that all cases will be ready for trial at the same time, so that if any are settled out prior to trial, other cases will be substituted for trial in their place." (App. p. 244).

This was followed by a discussion of the matter at the pre-trial conference on December 14, 1966. American protested and Judge Pence reserved his decision. At a pre-trial conference on February 3, 1967, appellees' counsel urged the trial court to order simultaneous trials before separate judges. American again pointed out the inequities of such a plan, but suggested the possible consolidation of all cases for a single trial.[4] Ap-

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[4]By this time all other defendants had settled and American's counsel was confronted by a battery of at least 20 groups of counsel representing plaintiffs.

pellees did not then and never have advanced a single sensible argument which would indicate the desirability of simultaneous trials. So also, appellees rejected the concept of a single trial which, of course, would conserve the time and expense of the litigants and the courts (App. pp. 269-278).

On February 21, 1967, the trial court entered Pre-Trial Order No. 9 which, except as to dates of execution, is the same as the order under review. However, on June 12, 1967, Judge Pence indicated that he might reconsider that portion of the order which required simultaneous trials and requested the parties to submit their views. He stated "Three fires might be enough or I might not use but one." (App. p. 267). Appellees recommended consolidation so as to permit the litigation to be tried in *seven* separate trials but with *three* simultaneous trials to be followed by *three* more simultaneously and finally followed by the remaining (seventh) trial before Judge Pence. Once again no real reasons were advanced in support of these proposals. American suggested two alternatives, (a) consolidation of the claims so as to permit three trials *in sequence* before Judge Pence, or (b) a single consolidated jury trial on the issue of liability before Judge Pence to be followed, if necessary, by a trial before Judge Pence without a jury on the question of damages (App. pp. 77-96). Either proposal of appellant would have resulted in economies of time and would have obviated the prejudice which will flow from simultaneous trials. Appellees rejected these proposals even though every plaintiff in every case is claiming that it was injured as the result of a single conspiracy.

On October 11, 1967, the trial court entered Pre-Trial Order No. 12, which, once again, provided for three or more simultaneous trials before three judges and, on October 30, 1967, American filed a motion for leave to file a petition for a writ of mandamus. While this motion was pending, the trial court (on November 27, 1967) filed Pre-Trial Order No. 14. The portion of said order from which these appeals are taken reads as follows:

> "S. A pre-trial conference is set for February 21, 1968, at 9:30 a.m. in San Francisco,[5] at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonzo Zirpoli (N.D. Calif.) and/or such other judges as may be designated, will preside. At such time the trial judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district, and (d) determine whether other cases pending in any such district should be consolidated for trial. At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968. Among other things, the following matters will be considered:
>
> (1) The voir dire examination;
>
> (2) The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

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[5]On January 12, 1968, the date for this particular pre-trial conference was postponed to some date in the near future to be established by Judge Pence.

(3) The number of jury challenges permitted, the number of alternate jurors to be impaneled. and the necessity that a verdict be returned by a jury of twelve;

(4) Jury instructions and special interrogatories;

(5) Counsel's opening statements;

(6) The days and hours of the week during which Court will be conducted;

(7) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

(8) Daily trial transcripts;

(9) A current index of the trial record;

(10) The handling of documentary evidence at trial;

(11) The scope of testimony of witnesses to be called at trial and possible limiations with respect thereto;

(12) The use of depositions, including the possible use of narrative summaries or verbatim extracts;

(13) The parties' report on their attempts to stipulate as to facts;

(14) Further pre-trial proceedings;

(15) Rulings on objections to designated deposition testimony and documentary evidence, where possible;

(16) Possibility of settlement." (App. pp. 121-122).

On December 26, 1967, notices of appeal from the above order were filed in each of these cases in each of the Districts involved.

When it came time to file appellant's trial brief below under the order appealed from, appellant wrote to Judge Pence as follows:

> "Since the filing of such Notice of Appeal passes the jurisdiction in these cases from the district courts to the Court of Appeals and the district courts have no further jurisdiction, it would be abortive for Defendant American to file its Pre-Trial Brief on the due date, December 31, 1967. See *Jarva v. United States* CA9, (1960) 280 F. 2d 892, 894; *Resnik v. La Paz Guest Ranch*, CA9, (1961) 289 F. 2d 814, 818.
>
> We wish to assure your Honor and all counsel for plaintiffs who will receive a copy of this letter that this appeal has not been taken for purposes of delay. Accordingly, we are transmitting herewith (and to all counsel for plaintiffs) copies of Defendant American's Pre-Trial Brief, but we are not formally serving or filing it at this time." (App. p. 222).

Appellees filed a brief asserting that the order was not appealable and appellant responded (App. pp. 223-240).

On January 12, 1968, the trial court decided that the appeals were a nullity and that, consequently, it retained jurisdiction to enter further orders on the merits (App. pp. 314-319). On January 26, 1968, appellant filed its motion in this Court for a stay of proceedings below pending appeal.[6] On appellant's motion, a temporary stay was entered on January 29, 1968 and a hearing was set for February 5, 1968 on appellant's motion for

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[6]Appellant also moved for consolidation of the appeals and said motion was granted on February 5, 1968.

a stay pending appeal. In response, appellees, among other things, moved to dismiss these appeals. This Court entered a modified stay, passed appellees' motion for consideration until the proceedings are submitted on the merits and ordered that this proceeding "shall be considered in the nature of mandamus."[7]

Issues Presented.

A. Whether Deliberately Planned Simultaneous Trials of Three or More Complex Cases Would Deny Appellant a Fair Trial?

B. Whether, in Multi-District Litigation, a Trial Court Can Order Simultaneous Trials Over the Objections of the Sole Defendant?

C. Whether a Trial Court Can Empanel a Special Multi-Judge Court to Make in Advance of Trial Substantive Rulings Which Will Affect the Outcome of the Trials of Many Cases?

D. Whether the Challenged Order Is Appealable?

Specification of Error.

The trial court erred in entering Paragraph 5S of Pre-Trial Order No. 14.

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[7]This Court entertained extensive oral argument directed to appellees' claims that the appeals were untimely and were interposed for purpose of delay. In view of the February 5th order, American does not propose to burden the Court with further argument on the technical and procedural points raised by appellees. Accelerated briefing and a limited stay provision were affirmatively suggested by American.

ARGUMENT.

I.

The Deliberately Planned Simultaneous Trials of Three or More Complex Cases Will Deny American a Fair Trial.

All parties agree that the pending cases are closely related and involve complex facts. Each appellee claims that it was victimized by the same single conspiracy and each is claiming monetary damages. Recognizing that the cases were closely related, the Chief Judge of this Court and the Chief Judges of the Districts below, issued orders which assigned all of the cases to Judge Pence "for all further proceedings therein." None of the parties objected to this procedure and all cooperated with Judge Pence in the joint pre-trial procedures ordered by him. After taking charge of the cases, Judge Pence charted a course of pre-trial discovery which was designed to have all cases ready to be tried at or about the same time because of the possibility that some of the cases would be settled and, if this happened, the remaining cases would be ready for trial.

If these 27 cases had been handled separately, within each of the five separate Districts, each would have had its separate pre-trial procedures and each would have reached the trial stage in its own separate fashion. Separate arrangements would have been made for the prosecution and the defense of each. If, *coincidentally*, all had proceeded to trial simultaneously, appellant would not be in this Court seeking relief. But that is not what happened here. This Circuit had a better plan which called for the assignment of one judge, one unified prosecution and one unified defense. After three years of this unified, joint effort, appel-

lant finds itself threatened with dismemberment—forced to proceed on three fronts rather than one. Assuming that the trial court had the power to deliberately plan and issue such an order, was it an abuse of discretion? Will it handicap American in presenting a meaningful defense? Does the zeal for *administration* of justice stand to interfere with justice itself? These are some of the many serious problems presented by this appeal.

The record clearly establishes that the sites of the three simultaneous trials will be Seattle, San Francisco and Los Angeles (App. p. 244). This is of importance to an understanding of the following very real problems which confront American:

(a) American selected trial counsel in reliance upon the orders transferring these cases to Judge Pence for all further proceedings therein and in the reasonable expectation that there would be separate seriatim trials, with or without some consolidation of trials. Thus, it is manifestly unfair to deliberately create a three-front war—especially where the appellees are allied in a common cause and there is no rational need for such an unorthodox procedure.[8] Now, counsel for appellant would be obliged to set up three separate trial staffs and for each of the trials prepare separately to meet the

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[8]About six months ago all of the appellees (except Washington Public Power Supply System) joined in a "Compact" in which they agreed not to accept individual settlements absent approval of a committee. In addition, under the terms of the Compact, it is difficult—if not impossible—for the members to withdraw any funds realized from any judgments until all of the cases have been settled or tried. Furthermore, all plaintiffs will share in any amount realized, whether they win, lose, or draw on their individual case (App. pp. 97-113). Although American is not challenging this agreement on this appeal, it goes far to explain appellees' demand for simultaneous trials.

oral testimony and documentary evidence offered by plaintiffs in each area. Since plaintiffs claim "a single unitary plan or agreement entered into by the executive officers of the defendant together with agents employed by the former defendants and others * * * a single plan, agreement or conspiracy" (App. p. 213) constant collaboration between the three separate staffs of appellant would be required throughout the three separate simultaneous trials. While one staff would be preparing to meet the day to day problems which arise throughout the trial by consultation with company executives and employees, reference to company records and the like in Los Angeles, staffs in the other two cities might well find themselves confronted with the same problems at the same time and, of course, handicapped by the preoccupation of the staff in Los Angeles with the same executives and employees and the same records.[9]

(b) American's counsel would be unduly handicapped at trial in that they could not have knowledgeable persons present at each of the various trials to supply information which would be helpful in cross-examining appellees' witnesses. In their pre-trial brief below, appellees plainly indicate that they propose to rely on the testimony of the same witnesses and upon the same documentary evidence to establish the alleged conspiracy at each of the separate trials. Much of the oral testimony, appellees indicate, will be in the form of depositions of witnesses previously taken at the instance of appellees. While appellees are offering in Seattle the deposition of witness Jones with all of the related docu-

[9]In contrast, appellees are equipped with twenty or more separate staffs of counsel each representing separate appellees in separate areas and are therefore peculiarly equipped to meet such problems with much greater ease.

ments, plaintiffs in Los Angeles and San Francisco may be offering the same. No amount of preparation prior to trial could ever resolve the day to day problems simultaneously confronting counsel in Seattle and counsel in the other two cities. Parenthetically it should be observed that the situation becomes even more complicated when one realizes that the trial court in Seattle might admit or reject evidence at the same time that the trial courts in the other cities are making contrary rulings with regard to the same evidence.

(c) American selected a single economic expert who, for many months, has studied a mass of computer runs relating to appellees' damage claims. It is essential to American's defense that this expert be present at each trial to hear appellees' evidence relating to damages claimed; to supply requisite information for an informed cross-examination of appellees' battery of experts; and to testify concerning the economic issues involved in appellees' damage claims. Quite obviously, in this respect alone, the order would so severely prejudice American as to deny its fundamental right to a fair trial.

(d) American's witnesses can only attend one trial at a time. Consequently, if the trials proceed simultaneously and approximately at the same pace, American would have to risk the wrath of the trial judges and more importantly, the juries by requesting frequent continuances. Even if American could count on the fact that requests for continuances would be granted, it would still be forced to defend the cases in mid-air. Meaning, counsel and the witnesses would have to depend upon jets and waiting rooms to confer regarding developments in each case. This problem has yet another aspect because one of American's officers

is a defendant in three of the pending cases. Certainly he should be entitled to attend the cases in which he has a personal stake.

(e) The simultaneous trials will cause practically insurmountable problems and substantial and unnecessary expense. To illustrate, because of the enormous number of documents involved, the trial court established a central document depository in Los Angeles containing all of the documents produced by all defendants, totaling hundreds of thousands of pages, most, if not all, of which have been designated by appellees for use at the trials (App. pp. 48-49). Obviously the depository cannot be in three places at one time. Even if the parties could agree on a stipulation which would permit the use of copies in lieu of original documents, American would be required to reproduce many copies of hundreds of thousands of exhibits.

These are but some of the many ways in which American will be prejudiced. American is justifiably fearful that separate records in the simultaneous trials might not clearly reflect that prejudice for eventual appellate review. What is the compelling need for such an order? No good reason has ever been advanced and we challenge appellees to advance one. Will it save trial time? Indeed, it will not. It may save some time on the calendar, but it will unnecessarily multiply the trial days. If prompt adjudication of the claims is said to be the reason, it is a feeble excuse since American has offered to submit to a single speedy consolidated trial and this offer was rejected out of hand. Thus, we are forced to the conclusion that this order under the guise of judicial administration is in reality a weapon designed to force American to settle the cases.

II.

Fundamental Justice Requires That This Related and Complex Litigation Be Conducted in a Manner Which Will Not Prejudice Appellant.

A. Multi-District Claims Can Only Be Consolidated for Trial if Consolidation Will Not Be Prejudicial.

Absent consent of the parties, actions pending in different districts may not be consolidated but, of course, the possibility of consolidation may persuade a court to transfer an action to another district where a related case is pending. Barron and Holtzoff, *Federal Practice and Procedure,* Vol. 2B, p. 178.

American does not and has not opposed consolidation —even consolidation which transcends district boundaries. It has merely insisted that it would be improper under Rule 42(a), F.R.C.P., to enter a consolidation order which, as here, would prejudice it. *Mays v. Liberty Mutual Insurance Co.,* 35 F.R.D. 234 (E.D. Pa. 1964); *American Photocopy Equipment Co. v. Fair Inc.,* 35 F.R.D. 236 (N.D. Ill. 1963); *Bascom Launder Corp. v. Telecoin Corp.,* 15 F.R.D. 277 (S.D. N.Y. 1953).

Appellees have never opposed partial consolidation. Indeed, they have affirmatively urged that the 27 cases be reduced to 7. If partial consolidation would not prejudice appellees, how could complete consolidation for trial purposes cause them harm—especially since they all rely upon a single alleged conspiracy? Under the circumstances, it is incumbent upon the trial court to devise a plan of partial or complete consolidation which will not cause prejudice or else allow the cases to be tried separately.

B. A Litigant Is Entitled to Have the Trial Judge Make Rulings on Fundamental Issues.

Although these cases were transferred to Judge Pence for all purposes and he is intimately familiar with the issues, Pre-Trial Order No. 14 specifies that a panel of three judges "will preside" at a pre-trial conference to be held on the eve of trial and consider, *inter alia,* jury instructions, special interrogatories, possible limitations on the scope of testimony, the use of depositions and rulings on objections to designated deposition testimony and documentary evidence.

This, then, is not to be an informal conference of judges to discuss problems of mutual concern. Instead, the order contemplates that this unorthodox panel will make substantive rulings which will have a direct effect on the outcome of all the trials. Article III, Section 1 of the Constitution vests in Congress the sole power to create "inferior courts" and the District Court system is established by 28 U.S.C. §81, *et seq.* The Chief Judge of this Circuit may designate district judges to sit in any district within the Circuit (28 U.S.C. §292(b)) and the Chief Judge of the district may assign a judge within his district to sit on certain cases (28 U.S.C. §137). Such powers, however, do not permit the convening of special district courts. Congress has provided for specially constituted district courts for extrordinary circumstances and their jurisdiction is strictly limited by statute. 28 U.S.C. §§1253, 2281, 2282, 2284 and 2325. Hence, the special panel called by Judge Pence is without authority to act. Moreover, Judge Boldt, one of the prospective members of the panel, has heretofore assigned all of the *Pipe Cases* pending in his District to Judge Pence (App. p.

27). Finally, F.R.C.P. Rule 77(b), in pertinent part, provides: ". . . no hearing . . . shall be conducted outside the district without the consent of all parties affected thereby."

When, as here, a judge is designated and assigned to handle certain cases he is required, during the period of the designation, to discharge "all judicial duties for which he is designated and assigned." 28 U.S.C. §296. Any orders which interfere with such a designation or conflicting orders of assignment are reviewable. *Johnson v. Manhattan Ry. Co.*, 61 F. 2d 934 (2nd Cir. 1932), *affirmed*, 289 U.S. 479 (1933).

Appellant does not claim that it has the vested right to have Judge Pence sit on each of the cases.[10] However it does contend that it is entitled to have vital rulings made by the trial judge and not by a committee.

III.

The Order Below Is a Final Appealable Order.

Although the February 5, 1968, Order of this Court established that these appeals "shall be considered in the nature of mandamus," American respectfully maintains that the challenged order is also appealable under the "collateral order" doctrine.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) was the first in a series of cases wherein the Supreme Court spelled out in detail the circum-

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[10]However, appellant does assert that the original assignment to Judge Pence for "all purposes" was in the best interests of judicial administration and that the last minute assignment of other judges is not. *Protracted Cases—Recommended Procedures* 25 F.R.D. 377; *Outline of Suggested Procedures, and Materials For Pre-Trial and Trial of Complex and Multiple Litigations*, p. 14.

stances meriting prompt appellate review of collateral orders which do not merge in or terminate an action.

Subsequently, in *Gillespie v. United States Steel Corp.,* 379 U.S. 148 (1964) the Supreme Court went one step further. In *Gillespie,* the District Court had granted defendant's motion to strike certain allegations from the complaint in a wrongful death action, including damage claims for pain and suffering asserted under the Jones Act and other recovery rights advanced on behalf of the brother and sisters of the decedent who were not parties to the action. The stricken claims *were* clearly *ingredients* of the cause of action and, hence, *would merge* in the final judgment and be reviewable at the termination of the litigation. Nevertheless, the Sixth Circuit afforded appellate review, and the Supreme Court affirmed, finding that the "delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them. * * *" (379 U.S. at 153). Moreover, since the ruling was "*fundamental* to the further conduct of the case," immediate review was warranted then and there. *Id.* at 153-54.

The *importance* of the issue to the pending case was the basis of the finding of finality in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962). There, Brown Shoe appealed under Section 2 of the Expediting Act from a judgment requiring dissolution but which left open the plan of divestiture. The Court stated (p. 306):

> "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy and inexpensive determination of every action': the touchstone of federal procedure."

Commentators have recognized that

> ". . . where substantial rights are determined by an interlocutory order or where protracted and costly proceedings are dependent upon these orders, postponing review until there has been a final adjudication works an undue hardship on the litigants."[11]

In a case pending in this Court (*Shell Oil Company v. Jones, et al.* No. 22441), appellant noticed an appeal from an order entered under Rule 30(b) of the Federal Rules of Civil Procedure sealing depositions in a treble damage antitrust case. Four days thereafter, appellees moved to docket the appeal and to dismiss the same. The Court has entered an order passing consideration of the motion to dismiss to the hearing of the case on the merits. In any event, the appeals in the *Jones* case and the instant appeals raise important questions regarding the applicability of the collateral order doctrine to fundamental rulings which, as far as appellant can ascertain, have never been determined by this Court. In order to avoid undue repetition, appellant will not burden the Court with the further citations with respect to the applicability of the collateral order doctrine, but refers the Court to appellant's memorandum in support of its motion for a stay of proceedings.

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[11] *Requiem For the Final Judgment Rule,* 45 Texas L. Rev. 292, 293. See also *Appealability In the Federal Courts,* 75 Harv. L. Rev. 351.

IV.

In Any Event This Court Should Adhere to Its Decision to Treat the Appeals as a Mandamus Proceeding and Should Take Corrective Action.

Although American contends that the order below is appealable, if the Court finds that the appeals are improvident, it can and should still review the order by treating the appeals—as it has—in the nature of a mandamus proceeding. *Maricopa Tallow Works, Inc. v. U.S.,* 1968 Trade Cases ¶72,346 (9th Cir. 1967); *Olympic Refining Co. v. Carter,* 332 F. 2d 260 (9th Cir. 1964) *cert. denied,* 379 U.S. 900 (1964); *Continental Oil Company v. United States,* 330 F. 2d 347 (9th Cir. 1964); *Steccone v. Morse-Starrett Products Co.,* 171 F. 2d 197 (9th Cir. 1951); *Shapiro v. Bonanza Hotel Co.,* 185 F. 2d 777 (9th Cir. 1950); *Hartley Pen Co. v. United States District Court,* 287 F. 2d 324 (9th Cir. 1961).

Conclusion.

For the foregoing reasons, the order requiring simultaneous trials should be reversed and an order of this Court should be issued directing Judge Pence to vacate that order.

Respectfully submitted,

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Dated: February 15, 1968.

Certificate.

I certify that, in the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

George W. Jansen

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; PROPOSED ORDER GRANTING LEAVE TO MOVANT TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; and BRIEF OF AMICUS CURIAE IN OPPOSITION TO BRIEF OF APPLICANT

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IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

MOTION FOR LEAVE TO FILE BRIEF AS

AMICUS CURIAE AND

TO APPEAR AND MAKE ORAL ARGUMENT

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

NOW COMES HONORABLE MARTIN PENCE, Chief United States District Judge for the District of Hawaii, sitting by special assignment in the Western District of Washington, District of Oregon, Northern District of California, Central

District of California, and Southern District of California, Movant herein, by his attorney, and MOVES THE COURT

For leave to file the attached Brief as Amicus Curiae In Opposition To Brief Of Applicant American Pipe and Construction Co., and to appear and make oral argument. Pursuant to Rule 18(9)(b) of this court, Movant relies upon the following facts and reasons in support of his motion:

Each of the above-captioned actions seeks review of a pre-trial order entered in civil, treble-damage antitrust actions now pending before Movant below. Such actions have been assigned to Movant for over three years just past, during which period pre-trial proceedings have been conducted according to identical pre-trial orders designed to prepare all of over 100 actions for trial. The pre-trial proceedings conducted to date include discovery proceedings under Rules 26, 33, and 34, Fed. R. Civ. Pro., the preparation and exchange of detailed trial briefs setting forth all facts and legal authority on which each party intends to rely or introduce into evidence at trial, and identification of and rulings on questions of law, where possible. In addition Pre-Trial Order No. 15 (dated February 26, 1968), which supersedes Pre-Trial Order No. 14 from which American Pipe and Construction Co. has taken this application, requires

that the parties, among other things, (a) designate all deposition testimony and documentary evidence they intend to introduce at trial, (b) produce all polls, samples, summaries, surveys, and computer runs, including all raw data and work sheets and an explanatory statement they intend to introduce at trial, and (c) file requests for admissions of facts and of genuineness of documents, witness lists, suggested voir dire questions, suggested instructions and suggested special interrogatories to the jury. Applicant challenges that provision of Pre-Trial Order No. 14 which sets three or more of the actions below for separate trial. Such a provision was first suggested in a letter from Movant to lead counsel for all parties dated November 28, 1966. (Appendix to Movant's Brief In Opposition To Brief Of Applicant at page 11.) It was first formalized as paragraph 7Q, Pre-Trial Order No. 9 (dated February 21, 1967), and has been repeated in substance in three (3) subsequent orders (Pre-Trial Order No. 12, paragraph 5P, dated October 11, 1967; Pre-Trial Order No. 14, paragraph 5S, dated November 27, 1967; and Pre-Trial Order No. 15, paragraph 26, dated February 26, 1968). (Pre-Trial Orders Nos. 9, 12, 14, and 15 are attached to Movant's Brief In Opposition To Brief Of Applicant at pages 12-50.) Movant's trial calendar may be directly affected by the outcome of these proceedings.

On December 1, 1967 this Court of Appeals denied applicant's motion for leave to file petition for writ of mandamus in American Pipe and Construction Co. vs. HONORABLE MARTIN PENCE, Chief Judge of the United States District Court for the District of Hawaii, No. 22336. That proceeding involved the same substantive issues as are presented herein. On January 9, 1968 this Court of Appeals further denied applicant's application for reconsideration of motion for leave to file petition for writ of mandamus and request for hearing en banc in Court of Appeals Number 22336.

On February 5, 1968 this Court of Appeals ordered "that this proceeding shall be considered in the nature of mandamus."

Writs of mandamus are commands which require performance by the party (Movant herein) to whom the command, if granted, would be directed. Movant may be an indispensable party to these proceedings, without whom they cannot continue. See Hospoder v. United States, 209 F.2d 427 (3 Cir. 1953). Any order of this Court of Appeals granting applicant's requested relief would be directed to Movant, and would specifically affect Movant's trial settings in the pending actions below. Yet, Movant is not now a party to the instant proceedings, taken originally in the form of an appeal, and

his interests are not represented before this court.

The sole question presented by these proceedings is the authority of the district judge to set ready actions for trial. Applicant's complaint is directed toward an order initiated by Movant below, and does not require determination of rights between the parties to the litigation. Movant is the real party in interest, and should be allowed to file an answer and contest applicant's position. Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, Ark. 100 F.2d 202 (8 Cir. 1938); Davis, et al. v. Board of School Commissioners of Mobile County, Alabama, 318 F.2d 63 (5 Cir. 1963); Rapp v. Van Dusen, 350 F.2d 806 (3 Cir. 1965).

Movant has secured written consent to file his brief from all parties to this proceeding, copies of which are attached hereto as Appendices A, B, and C. Accordingly, it would appear that Movant is entitled, of right, to file his brief under Rule 18(9)(a) of this Court of Appeals. However, considering the unusual nature and posture of this proceeding, Movant does no more than request the Court's permission to file and be heard.

Movant is represented in these proceedings by JOSEF D. COOPER, Esq. Mr. Cooper was admitted to practice before this Court of Appeals on March 23, 1967, and has also

been admitted to practice before all the courts of the States of Hawaii and Illinois, and the United States District Courts for the District of Hawaii and the Northern District of Illinois. Mr. Cooper has been employed by Movant as his special administrative assistant for the actions below since July 18, 1966, and has full knowledge of all proceedings therein.

DATED: February 28, 1968.

Respectfully submitted,

JOSEF D. COOPER

Josef D. Cooper

Attorney for Movant,
Honorable Martin Pence.

AMERICAN PIPE AND CONSTRUCTION CO.
CORPORATE HEADQUARTERS: 400 SOUTH ATLANTIC BOULEVARD, MONTEREY PARK, CALIFORNIA 91754

PLEASE REPLY TO:
110 LAUREL STREET
SAN DIEGO, CALIFORNIA 92101
(714) 233-6337

February 24, 1968

Hon. Martin Pence, Chief Judge
United States District Court
District of Hawaii
U. S. Courthouse and Post Office
Honolulu, Hawaii

Re: American Pipe and Construction Co. v. The State of California, et al
U. S. Court of Appeals, Ninth Circuit
Nos. 22541 A-G, 22574, 22575, 22576 A-L,
22577 A, 22578 A-C.

Dear Judge Pence:

Pursuant to your request, I am happy to consent on behalf of appellant American Pipe and Construction Co. to the filing of a brief amicus curiae by you in the above captioned matter. This consent is pursuant to the provisions of Rule 18.-9.(a).

Respectfully yours,

George W. Jansen

GEORGE W. JANSEN

GWJ:mmj

MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND
TO APPEAR AND MAKE ORAL ARGUMENT

GUSON
. BURDELL
LHOEFT
L. DAVIDSON
LPERT, JR.
MANNING
GREENAN
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MOORE
DOUPE
HEPPARD

Ferguson & Burdell
929 LOGAN BUILDING
Seattle, Washington 98101
MAIN 2-1711

February 26, 1968

Honorable Martin Pence
Chief Judge
United States District Court
P.O. Box 19
Honolulu, Hawaii 96810

Dear Judge Pence:

Please be advised that the Compact Plaintiffs consent to your filing an amicus curiae brief in accordance with Rule 18(9)(a) of Rules of the United States Courts of Appeals.

Very truly yours,

FERGUSON & BURDELL

Wm H Ferguson

By: Wm. H. Ferguson
Lead Counsel

WHF:sl

MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND
TO APPEAR AND MAKE ORAL ARGUMENT

APPENDIX B

OUGHTON
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HLIN
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HOUGHTON, CLUCK, COUGHLIN, SCHUBAT & RILEY
320 CENTRAL BUILDING
SEATTLE, WASHINGTON 98104

TELEPHONE
MAIN 3-6501

February 26, 1968

Hon. Martin Pence
Judge of the United States
District Court for the
State of Hawaii
P. O. Box 19
Honolulu, Hawaii 96810

Re: Nos. 22541 A-G, 22574, 22575, 22576 A-L
22577 A, 22578 A-C
In the United States Court of Appeals
for the Ninth Circuit
American Pipe and Construction Co., Appellant
vs.
The State of California, et al., Appellees

Dear Judge Pence:

Please be advised that we consent to the filing of a brief as amicus curiae in the captioned matter pursuant to the provision of Rule 18(9)(a) of the Rules of the United States Court of Appeals for the Ninth Circuit.

Very truly yours,

HOUGHTON, CLUCK, COUGHLIN,
SCHUBAT & RILEY

By John W. Riley
John W. Riley
Attorneys for Washington Public
Power Supply System, Appellee
Civil Cause No. 6568
United States District
Court for the Western
District of Washington

JWR:jlt
cc: Ferguson & Burdell
George W. Jansen, Esq.

MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND
TO APPEAR AND MAKE ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

ORDER GRANTING LEAVE TO MOVANT TO FILE BRIEF
AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT

IT IS HEREBY ORDERED that the Motion of Honorable Martin Pence to file a brief as amicus curiae in the above-captioned actions, and to appear and make oral argument is GRANTED.

DATED: March _____, 1968:

_____

_____

_____

United States Circuit Judges

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

On Appeal From the United States District Courts for The: Western District of Washington, District of Oregon, Northern District of California, Central District of California, and Southern District of California.

BRIEF OF AMICUS CURIAE IN OPPOSITION TO BRIEF OF APPLICANT

JOSEF D. COOPER
Room 310
United States Courthouse
Honolulu, Hawaii 96813

Attorney for Amicus Curiae,
Honorable Martin Pence

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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v.

The State of California, et al., Appellees

BRIEF OF AMICUS CURIAE IN OPPOSITION

TO BRIEF OF APPLICANT

JURISDICTION

On December 26, 1967 applicant American Pipe and Construction Co. initiated the instant proceedings by filing notices of appeal in twenty-seven (27) civil anti-trust actions now pending in the district courts. Such actions were filed by over three hundred (300) plaintiffs

who claim injury allegedly resulting from overcharges on approximately 2200 purchases of pipe from applicant. All of these actions have been assigned to Judge Martin Pence, Chief Judge, United States District Court for the District of Hawaii (the amicus curiae herein), sitting by designation of the Chief Judge of this Appellate Court pursuant to Title 28, U.S.C. § 292(b) in the various districts where such actions are pending. The specific civil actions were assigned to Judge Pence by the Chief Judge of each district subsequent to Judge Pence's designation to hold court in such district. (Copies of the designations assigning Judge Pence to each district, and sample orders assigning the specific cases to Judge Pence, are attached hereto as Appendix pages 1-10.)

Judge Pence conducted his first pre-trial conference in these actions on March 11-12, 1965. Since that time Judge Pence has conducted pre-trial hearings almost monthly, and has entered fifteen (15) pre-trial orders scheduling pre-trial proceedings in all actions. Although identical pre-trial orders have applied to all actions, and the parties have generally performed the ordered acts on a common, joint, or co-operative basis, no order has ever been entered consolidating these actions for any purpose. To the contrary, Judge Pence's pre-trial orders have specifically provided

that each order be entered and apply severally to each pending action.

Applicant is contesting paragraph 5S of Judge Pence's Pre-Trial Order No. 14, dated November 27, 1967, which schedules three or more of the instant actions for separate trial. The possibility of such a provision was first suggested by Judge Pence in his letter to counsel dated November 28, 1966, as follows:

> ". . . The possible revision /of an anticipated pre-trial order/ that I am considering is that of scheduling all discovery in all cases to be carried on simultaneously and then holding practically simultaneous trials in Seattle--with Judge Boldt sitting -- San Francisco--with Judge Zirpoli sitting, and in Los Angeles--with myself sitting -- sometime around October 1967. If this procedure is followed, it is anticipated that all cases will be ready for trial at the same time, so that if any are settled out prior to trial, other cases will be substituted for trial in their place." (Appendix page 11.)

On February 21, 1967 Judge Pence entered Pre-Trial Order No. 9, which contains a provision (paragraph 7Q) identical (except as to dates) with that under review herein. The dates, but not the substance, of Pre-Trial Order No. 9 were revised by Pre-Trial Order No. 12 (dated October 11, 1967), which also contains a provision (paragraph 5P) identical with that under review. On February 26, 1968 Judge Pence signed Pre-Trial Order No. 15, which contains a provision (paragraph 26) comparable in substance to paragraph 5S of Pre-Trial Order No. 14, but which alters the dates of execution and certain of the operable language. Such changes were made to clarify any ambiguity existing in the prior orders. (Pre-Trial Orders Nos. 9, 12, 14 and 15 are attached hereto as appendix pages 12 - 50.) Pre-Trial Order No. 15 superseded all previous orders of the trial court insofar as they may be inconsistent. Applicant's challenge, therefore, must now be directed to paragraph 26 of Pre-Trial Order No. 15. For the convenience of this Court of Appeals we are reproducing below, side by side, the relevant portions of Pre-Trial Orders Nos. 14 and 15.

Paragraph 5S Pre-Trial Order No. 14	Paragraph 26 Pre-Trial Order No. 15
A pre-trial conference is set for February 21, 1968, at	A pretrial conference is set for June 5, 1968, at

9:30 a.m. in San Francisco, at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonso Zirpoli (N.D. Calif.) and/or such other judges as may be designated, will preside. At such time the trial judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district, and (d) determine whether other cases pending in any such district should be consolidated for trial. At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time

9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the or-

as the presiding judge shall determine, but in no event later than March 18, 1968. Among other things, the following matters will be considered:

derly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:

Sub-paragraphs 5S(1)-(16) of Pre-Trial Order No. 14 are identical with sub-paragraphs 26(A)-(P) of Pre-Trial Order No. 15. (Appendix pages 33 - 50.)

On October 30, 1967 applicant filed with this Court of Appeals a Motion For Leave To File Petition For Writ of Mandamus, which was denied on December 1, 1967 under the title of American Pipe and Construction Co. v. Honorable Martin Pence, Chief Judge of the United States

District Court for the District of Hawaii, Cause Number 22336. (Appendix page 51.) Applicant's mandamus petition asserted the same basic claim of error as is now before this Court of Appeals. (Appendix pages 52 - 59.) Applicant filed an Application For Reconsideration Of Motion For Leave To File Petition For Writ Of Mandamus and Request For Hearing En Banc on December 22, 1967, which was denied by this Court of Appeals on January 9, 1968. (Appendix page 60.) Prior to a ruling on the application for reconsideration, on December 26, 1967, applicant filed the notices of appeal from which has evolved the instant proceedings. Three days after filing its notices of appeal, on December 29, 1967, applicant wrote Judge Pence a letter (Appendix page 61) asserting that the trial court was deprived of jurisdiction to proceed in these actions by reason of the pending appeal. On January 12, 1968 Judge Pence conducted a pre-trial conference to determine the effect, if any, of applicant's notices of appeal. At that time Judge Pence held that (1) Pre-Trial Order No. 14 was not an appealable order, (2) applicant's appeals were not well founded and amounted to a nullity, and (3) the trial court retained jurisdiction to continue processing the litigation. On January 26, 1968 applicant moved this Court of Appeals for a stay of proceedings below pending appeal. On applicant's

motion a temporary stay was entered on January 29, 1968. This Court of Appeals conducted a hearing on applicant's motion for a stay pending appeal on February 5, 1968, at which time it stayed all trials in these actions below and ordered that this proceeding "shall be considered in the nature of mandamus." (Appendix pages 62 - 63.)

Applicant asserts this Court of Appeals has jurisdiction to review Pre-Trial Order No. 14 (now Pre-Trial Order No. 15) under Title 28 U.S.C. § 1291, referring to appeals from final decisions of district courts, and Title 28 U.S.C. § 1651(a), the all writs act. Contentions allegedly supporting the jurisdiction of this Court are set forth in Parts III and IV of applicant's brief, entitled ARGUMENT (at pages 19 - 22). Part III attempts to establish jurisdiction under 28 U.S.C. § 1291 by showing that Pre-Trial Order No. 14 is a final decision of a district judge since it falls under the "collateral order" doctrine, citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), and Brown Shoe Co. v. United States, 370 U.S. 294 (1962). As noted above, Judge Pence held on January 12, 1968 that Pre-Trial Order No. 14 is not an appealable order under the authority of those cases. This holding of the

court below is implicitly affirmed by the order of this Court of Appeals, dated February 5, 1968, which "ORDERED that this proceeding shall be considered in the nature of mandamus . . . ." We therefore consider applicant's assertions of jurisdiction based on appeal from a final decision as moot, and do not contest them here.

Neither do we contest the assertions made in Part IV of applicant's brief, referring to review under 28 U.S.C. § 1651(a). This Court of Appeals having held that the instant proceedings constitute a petition for writ of mandamus, amicus curiae herein treats it as such. It is because the trial court was not previously represented in this proceeding and is the real party in interest (as set forth in its motion for leave to file an amicus brief), and because of the unusual circumstance that this Court of Appeals is, in effect, considering the same mandamus petition for the third time, that the amicus curiae is appearing herein.

ISSUE PRESENTED

There is but one basic question presented by these proceedings, to wit, the authority of the district judge to control his own calendar and set ready actions for trial.

SPECIFICATION OF ERROR

Applicant has alleged only one ground for error, the entry of Pre-Trial Order No. 14, paragraph 5S. As noted above Pre-Trial Orders Nos. 9 and 12 contained provisions with identical language. Although we are not certain why such identical provisions of pre-trial orders operating in the same factual context would not likewise be error, and presumably reviewable at the time of entry in a similar manner, we will not assert that applicant's 11-month delayed challenge is estopped or waived. Rather, we urge that applicant's assertions be tested on the merits.

It has also been noted that Pre-Trial Order No. 15, paragraph 26, supersedes paragraph 5S of Pre-Trial Order No. 14. Accordingly, we will orient our discussion to the language of the now controlling order of the trial court.

ARGUMENT

I.

Three Separate Trials As Contemplated By Pre-Trial Order No. 15, Paragraph 26 Will Not Deny Applicant A Fair Trial

Paragraph 26 of Pre-Trial Order No. 15 contains the following provision relating to trial settings:

"A pretrial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer

"or assignment of the designated cases to such judges. Among other things, the following matters will be considered: "

Applicant stated twenty-two (22) times in its brief that it faces "three simultaneous trials", and catalogued the horrendous inequities to which it would be subjected by such an ordeal. Not once did applicant insert any modifying word to indicate or even hint that the three separate trials would not begin on the same minute of the same hour of the same day. Yet, for over 11 months it has been clearly understood by everyone (and that includes applicant's attorneys) acquainted with the anticipated procedure that specific trial settings would not be made until the three proposed trial judges could sit in conference and evaluate the then pending actions to determine (a) the most appropriate actions for trial, and (b) methods for coordinating the separate proceedings to insure fair trials. Since applicants can hardly deny that they are familiar with the history and language of the district court's order, applicant therefore appears to have deliberately misled this Court of Appeals by suggesting that the trials would "proceed simultaneously and approximately at the same pace . . . ." (Applicant's brief at page 15.) Judge Pence's first

communication to counsel regarding three separate trial settings indicated that the trials would begin at staggered intervals. (Appendix page 11.) Pre-Trial Order No. 15 now specifies that such intervals shall not be less than two weeks. We must presume that experienced trial judges, such as the three named, will, of course, adjust their respective calendars to insure orderly and coherent trials.

Applicant has accurately stated that Judge Pence designed pre-trial proceedings to prepare all actions for trial on a common schedule. Such a plan was followed for the first fifteen (15) months that Judge Pence presided over these actions. At that time it was suggested that four bellweather actions be singled out for further pre-trial proceedings and seriatim trial, with all remaining actions (then over 100) stayed until conclusion of the bellweather trials. After four months of consideration Judge Pence tentatively adopted such a plan, contemplating trials spaced at 60- to 90-day intervals. Judge Pence continued to wrestle with this "angel", which match resulted in his letter of November 28, 1966 suggesting continuation of the simultaneous <u>preparation</u> of all actions but with three separate trial settings. The decisive factors in his decision were:

(1) The pending actions admittedly grow out of the same Government proceeding and the claims rely upon the same underlying assertions. Since these actions involve "similar claims, issues, and in many instances, identical oral testimony and documentary evidence" (Applicant's brief at page 1), the preparation of one action for trial is in most regards the preparation of all actions for trial.

(2) If the four bellweather trials procedure were followed, assuming each lasted 60 days with 60-day intervals between, Judge Pence would have spent fourteen (14) months processing four actions, and the claims of the vast majority of plaintiffs would still remain untried. If one or more of the bellweather actions were settled before trial an extensive hiatus would be necessary to prepare a substitute action for trial.

(3) All plaintiffs are entitled to a speedy determination of their claims. The "bellweather" approach prejudices the majority of plaintiffs by staying their proceedings approximately two (2) years while selected actions are processed. This is true despite the fact that any system for

selecting the bellweather actions is functionally arbitrary. Admitting that there will be preference given particular claims by selection for the initial trials under the current order, this procedure minimizes the different treatment given the parties.

(4) The almost explosive, nation-wide increase in multiple related filings presents both the trial and appellate judiciary with novel problems of judicial administration and requires innovative procedures. As Judge Pence has often told counsel, quoting Dr. Hayakawa, we must all be extentionalists, and adapt ourselves to ever changing circumstances. The assignment by the Chief Judge of the Court of Appeals of this mass of related actions to a single district judge for coordinated proceedings has resulted in economies and savings which have inured to the benefit of the courts and parties alike. However, the benefits of coordinated proceedings are primarily limited to the pre-trial stages, especially where, as here, one of the parties is exercising its right to demand a jury trial. Rule 38, Fed. R.

Civ. Pro.; Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916); Beacon Theatres, Inc. v. Westover, United States District Judge, 359 U.S. 500 (1959).

(5) Claims of some 300 plaintiffs in 27 actions based on approximately 2200 transactions are too voluminous to permit a single, equitable, consolidated jury trial. (At the time the challenged provision was first ordered the number of claims was over 3 times larger than now pending.) Twenty-seven separate seriatim trials before a single judge would require an indeterminate amount of time--seven years if we presume four trials a year. Assuming five or six consolidated trials is feasible, a minimum of 18 months would be necessary if all actions were tried before a single judge.

(6) New procedures must be devised to accelerate trial settings in instances of multiple litigation while retaining the benefits of coordination, for which these actions were originally assigned to Judge Pence. The orderly administration of the courts demands that the parties be

relieved of the possibility of different and possibly conflicting pre-trial rulings and proceedings before different judges, with all the waste and inefficiency inherent in duplicative or conflicting proceedings in related actions. At the same time, trials must be scheduled which assure prompt adjudication of all claims. The trial plan ordered by Pre-Trial Orders Nos. 9, 12, 14, and 15 accomplishes this purpose by the simple procedure of assigning ready cases to other experienced judges for trial. This same method of calendar control is utilized by every jurisdiction which employs a master calendar.

(7) The actions would be tried in the jurisdictions where filed. The trial locations and probable presiding judges will be determined sufficiently prior to trial to allow all parties opportunity to secure sufficient personnel.

Considering these factors, Judge Pence initiated the chain of events resulting in the provision of Pre-Trial Order No. 15 here being reviewed. The two proposed additional trial judges have been continually informed of

proceedings in these actions, and have maintained their dockets to allow for trials when specific actions are ready and assigned.

Applicant sets forth certain specific inequities which would be caused by separate trials as ordered by Pre-Trial Order No. 15. These include asserted difficulties connected with (a) coordinating different trial staffs, (b) and (c) meeting the same or similar evidence in different locations at the same time, and (d) and (e) producing the same witnesses and documents in different locations at the same time. However, assuming arguendo that such conditions would be prejudicial, applicant's assertions rest on the fanciful position noted above that all three trials would commence literally simultaneously. This is not the case, was never intended, and has never been ordered by the district court. Each and every one of applicant's specific complaints, therefore, evaporate. In fact, rather than being prejudicial, overlapping trials as contemplated may produce substantial benefits by limiting the number of times counsel must prepare witnesses, minimizing witnesses' memory problems, and maintaining consistency in testimony. Applicant assumes that a barrier exists which precludes the various judges from cooperating and coordinating the conduct of

their trials if such is necessary. However, in this era consultation is as close as the nearest telephone. Considering the staggered starting dates for each trial, and the projected length of trial, it is silly to presume that each of these experienced trial judges can not carry on his particular trial in an orderly fashion.

Applicant concludes that paragraph 26 of Pre-Trial Order No. 15 has no saving grace save as a weapon to force applicant to settle these actions. But district courts cannot expect, assume, or rely on the parties to any action reaching an amicable adjustment of their differences. District courts can only presume that lawsuits are to be resolved by trial. To do otherwise would create a moribund and chaotic docket. The Judicial Conference of the United States has stated that actions pending more than two years are stale and might properly be ripe for dismissal for want of prosecution. Some of these claims have already been pending for more than three years. By June, 1968, the initial date now set for trial herein, all of these actions will have been pending for over two years. The district court has only one course of conduct available: to insist that each and all of these actions are prepared for trial, to set these actions for trial as soon as is reasonably

possible, and, when then ready, to see that trials are undertaken, all as ordered by the pre-trial orders herein.

II

Applicant Has Not Been Prejudiced By Consolidations For Trial As No Such Consolidations Have Been Ordered

Page 17 of applicant's brief is devoted to establishing the proposition that "the trial court /must/ . . . devise a plan of partial or complete consolidation /under Rule 42(a), F.R.C.P./ which will not cause prejudice or else allow cases to be tried separately." The court below has never entered any order consolidating any of these actions for trial. To the contrary, on the one occasion when a consolidation motion was presented (Appendix pages 64 - 66), Judge Pence reserved ruling until a more appropriate time. Pre-Trial Orders Nos. 9, 12, 14 and 15 specifically state that each order applies severally to each pending action. Applicant's assertions regarding consolidation, therefore, are mere platitudes, and have no relevancy to the subject matter of this proceeding.

III

Pre-Trial Order No. 15 Does Not Attempt To Constitute An Improper Court

Applicant has clutched upon the words "will preside" in Pre-Trial Order No. 14, paragraph 5S, line 10, and would now have this Court believe that Judge Pence was thereby attempting to convene a "special" three-judge district court, an "unorthodox panel", a "committee", to sit and "make substantive rulings" effecting the outcome of these actions. (Applicant's brief at pages 18 - 19.) Allowing that the language of Pre-Trial Order No. 14 may have been ambiguous enough to permit such fanciful arguments--even though applicant knew the underlying facts to be otherwise, the now controlling Pre-Trial Order No. 15, paragraph 26, clearly states that Judge Pence will continue to be the sole presiding judge in these actions until they are formally assigned to other judges pursuant to the conventional procedures therefor. Long before Pre-Trial Order No. 15, however, on December 14, 1966, at the very first hearing on the proposed trial settings (Pre-Trial Order No. 9), Judge Pence told all parties that all normal and necessary procedures required to assign these actions to any other judge would be followed. The following colloguy from the

transcript of December 14, 1966 between Judge Pence and Mr. Jansen, counsel for applicant, is particularly pertinent:

"MR. JANSEN: Now, I'd like to conclude, your Honor, by suggesting one thing and that is that before I came to court today, I went to the Clerk's office and obtained a copy of the order assigning the cases here in this district to you for all proceedings. Now, this order was signed by Judge Harris on December 15, 1964, and it says, '. . . good cause appearing, therefore it is hereby ordered that each of the following cases be and they are hereby assigned for all further proceedings to the Honorable Martin Pence, Chief Judge of the United States District Court for the District of Hawaii, ...' . . . And I find in this order that you are designated--you are assigned for all further proceedings and may I respectfully suggest, your Honor, that to go beyond that and, if I may use the word, abdicate, it seems to me might fly right --

"THE COURT: Counsel, don't concern yourself with what that order says until after we have

"decided, if we do decide, that we are going to have all of the key cases tried simi-simultaneously (sic) because, as you may recognize, what was true yesterday is not necessarily true today. That is true in your own situation. It is true on the books here and that is why I am sitting here. That is why I will continue to sit until such time as I decide and if my decision is concurred in by Judge Harris and Judge Chambers, by Judge Clark, Judge Lindberg, as it might be, at which time if it is necessary that the order be changed, it will be changed." (Appendix pages 67 - 70.)

Paragraph 26 of Pre-Trial Order No. 15 also specifies that the two additional trial judges will be attending the pre-trial conference now scheduled for June 5, 1968 for "consultation" with Judge Pence, and not as presiding judges. Judge Pence will make such rulings as may be appropriate until such time as these actions are no longer pending on his docket. Nothing prevents Judge Pence from continuing matters now appearing on the agenda for the June 5, 1968 conference which might be better handled by the trial judge.

Pre-Trial Order No. 15 does not contemplate creation of any special three-judge court, or provide for any action not authorized by law (nor was such ever contemplated under Pre-Trial Order No. 14).

CONCLUSION

Applicant has petitioned this Court of Appeals for a writ of mandamus curtailing the freedom of the district court to (1) set ready cases for trial, and (2) control its own docket. The order of the court below does not infringe upon any right of applicant or constitute a patent abuse of the district court's discretion. Accordingly, this Court of Appeals should not interfere with the trial settings contained in Pre-Trial Order No. 15, paragraph 26.

DATED: February 29, 1968.

Respectfully submitted,

JOSEF D. COOPER

Josef D. Cooper

Attorney for Amicus Curiae,
Honorable Martin Pence.

CERTIFICATE

I certify that, in the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joel D. Cooper

JOEL D. COOPER
Attorney for Amicus Curiae,
Honorable Martin Pence.

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

AMERICAN PIPE AND CONSTRUCTION CO.,

Petitioner

vs.

HONORABLE MARTIN PENCE, Chief United States District Judge, District of Hawaii,

Respondent

and

THE STATE OF CALIFORNIA, et al.,

Real Parties in Interest.

PETITIONER'S BRIEF IN RESPONSE TO THE BRIEF OF THE TRIAL JUDGE

GEORGE W. JANSEN
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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

AMERICAN PIPE AND CONSTRUCTION CO.,

Petitioner[1]

vs.

HONORABLE MARTIN PENCE, Chief United States District Judge, District of Hawaii,

Respondent

and

THE STATE OF CALIFORNIA, et al.,

Real Parties in Interest[2]

PETITIONER'S BRIEF IN RESPONSE TO THE BRIEF OF THE TRIAL JUDGE

The motion for leave to file and the respondent's brief[3] are noteworthy in several particulars. It would

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1/ By order of this Court filed March 12, 1968, appellant American Pipe and Construction Co. was redesignated "petitioner" appellees were redesignated "real parties in interest" and the trial court, having suggested that he may be an indispensable party, was designated "respondent."

2/ Ibid.

3/ Ibid.

appear that, in his desire to make certain that his order would be supported in this Court, Judge Pence has assumed the role of an advocate and as a result, consciously or unconsciously, may have lost the requisite air of detached impartiality with regard to the issues involved in this proceeding. Judge Pence's brief conclusively establishes that there is no substantive difference between Pre-Trial Order No. 15 and Pre-Trial Order No. 14 -- they both provide for three concurrent trials (R. Br. p. 4).[4/] Judge Pence's brief demonstrates that (contrary to the position of plaintiffs, the real parties in interest) these cases were in fact channeled to Judge Pence by the Chief Judge of this Court for all further proceedings therein (R. Br. pp. 15-16).

I. JUDGE PENCE'S EXPLANATION AND PURPORTED JUSTIFICATION OF THE ORDER REQUIRING THREE TRIALS AT ONCE

When petitioner consented to the filing of an amicus curiae brief, it assumed that the brief would follow the teaching of Rapp v. Van Dusen, 350 F.2d 806 (3rd Cir. 1965). Petitioner's motion for leave to file a petition for mandamus in No. 22336 specifically stated "To avoid the result which occurred in Rapp v. Van Dusen . . . counsel for

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4/ References to the respondent's brief are stated: "R. br. p. ____" and references to the accompanying motion are stated "R. mot. p. ____."

petitioner herein have requested the above named Court to follow the procedure adopted by the Third Circuit so that respondent here will be deemed a nominal party only, and plaintiffs, the prevailing parties in the challenged decision, will be deemed to be respondents . . ." Despite this, Judge Pence's moving papers assert that he may be an indispensable party and should be permitted to contest petitioner's position (R. mot. pp. 4-5). As the court stated in Rapp (350 F.2d at 813)

> "It is appropriate that his [the trial court's] original opinion be considered as his answer to the contentions of the petition and if no opinion already appears of record, or if he desires to supplement his opinion, he may file in the mandamus proceeding in this court a memorandum in support and explanation of his challenged action."

Such a procedure was devised to avoid getting the trial court "entangled as an active party to litigation", Ibid. p. 813. In the circumstances petitioner has no alternative but to respond to the arguments advanced in respondent's brief. 5/

5/ As to the charge by the author of Judge Pence's brief that petitioner's counsel have "deliberately misled this Court" (R. br. p. 12) and the suggestions that petitioner has made "silly" or "fanciful" arguments in disregard of the record (R. br. pp. 19, 21), petitioner has made every attempt to state its case with candor and honesty and believes the record speaks for itself.

Judge Pence's brief asserts that the sole question presented by this appeal is the authority of a trial court "to control his own calendar and set ready actions for trial" (R. br. p. 9). More precisely, the issue is the authority of Judge Pence to control and coordinate the calendars of several judges to make certain that three cases go to trial at the same time in the absence of a compelling reason therefor.

Petitioner is taken to task for not using any modifying terms in connection with the word "simultaneous" to indicate that the three trials would not begin on the same minute of the same hour of the same day. Webster defines "simultaneous" as meaning "at the same time" and no amount of quarreling over terminology will disguise the fact that the order will needlessly require three trials at the same time.[6/]

We are told that novel problems of judicial administration require the courts and counsel to be extentionalists. Adaptation to change is commendable - but we must make certain that judicial short-cuts do not impinge on the basic rights of the litigants. In other words, zeal for the administration of justice cannot be permitted to interfere with justice itself.

6/ Judge Pence's brief (p. 14) estimates that each case will last 60 days. If this is correct, the first and second trial would be conducted simultaneously for about six weeks and all three would be going on simultaneously for approximately four weeks.

We are informed that three cases must be tried at one time to avoid prejudicing the plaintiffs (R. br. p. 14). We have no quarrel with the basic premise that both sides are entitled to as "just, speedy and inexpensive determination of every action" as possible under the circumstances (Rule 1, F.R.C.P.). But, contrary to the inferences contained in Judge Pence's brief, any delay which might result from an orthodox trial plan is hardly of petitioner's making. While his brief indicates that the core of the problem is that one of the parties is insisting on a jury trial, respondent neglects to point out that it is the plaintiffs', not the petitioner's, insistence which forms that core. It does not follow from this that some system or any system must be devised to avoid making the real parties in interest wait their turn for a jury trial, just as plaintiffs all over the country do. What does follow is that some trial plan must be devised which will minimize the chance of denial of the fundamental right to a fair trial, a right far superior on any scale of values to any "right" to a speedy jury trial.

We are advised that 27 separate, orthodox and seriatim trials before a single judge is out of the question because of the interminable length of time which would be required therefor. Petitioner has never urged such a "solution." We are informed that a single, equitable jury trial is out of the question because there are too many plaintiffs and too many transactions (R. br. p. 16). Who, may we ask, runs the risk of being prejudiced by a single consolidated trial? Certainly not the real partics in

together in a champertous joint venture under which they have all agreed to share in any amount realized from any of their various claims. So also, plaintiffs lately assert damage flowing from a single alleged conspiracy. Their claims differ only in the amount sought. On the other hand, petitioner (while denying participation in any conspiracy) asserts that the most that plaintiffs can hope to prove is that there were different conspiracies which affected different products in different areas at varying times. Thus, it is petitioner who would run the risk and -- to avoid having to undergo concurrent trials -- it is willing to accept the risk.

Assuming, arguendo, that because of the jury demand of the real parties in interest, a single consolidated trial is out of the question, does this mean that simultaneous trials are reasonable or even necessary? Judge Pence's brief ducks this question. Every trial plan ever proposed below contemplated some type of consolidation. The Judge's brief unnecessarily presupposes that five or six consolidated cases would have to be tried by the same judge (R. br. p. 16). If Judge Pence has the authority to consolidate and assign some of these cases to Judges Boldt and Zirpoli, why does he not do so with no strings attached? What is the reason for respondent's insistence that the other judges must carefully arrange their dockets to make certain that the trials will run concurrently with the one being conducted

One thing is certain -- if some of the cases were merely assigned to other judges and if each controlled his own calendar, there is a real probability that some reasonable plan would be devised which would not require counsel and the parties to proceed on three fronts at once. Such a procedure is a pragmatic answer which could avoid the prejudice inherent in the other plan. Yet it is not discussed or considered. Why?

II. THE NEW ORDER WOULD CAUSE THE SAME DIRE CONSEQUENCES AS THE OLD ORDER

Faced with the belated concession of the real parties in interest that the challenged order would work a hardship upon them, respondent's brief does not come to grips with the inequities and prejudice to petitioner. It is inferentially conceded (R. br. p. 18) that prejudice would flow from "literally simultaneous" trials, but would somehow evaporate if an "overlap" approach were devised.[7/] It is suggested that petitioner even now should have faith in trial judges and hope that by telephonic consultation

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7/ The potential areas of prejudice which petitioner set forth in its Opening Brief were predicated upon an order which both respondent and the real parties in interest concede is substantively the same as the new order.

they can and will overcome the detriment inherent in such an arrangement. Everyone but petitioner ignores the possibility of trying to eliminate the handicaps which are present only in deliberately planned simultaneous trials.

There are said to be benefits which could flow from the order -- briefing time with witnesses might be reduced and their testimony should be consistent. It is perhaps true that briefing time would be reduced -- it might even be eliminated because there would be no real opportunity to prepare witnesses as they shuttle from city to city up and down the length of the West Coast. Petitioner desires a more orthodox approach to the presentation of evidence -- especially that of the expert witnesses whose detailed testimony perforce must be directed to particular claims of damage. They cannot be prepared like trained seals with a single script which can be used in all the cases.

CONCLUSION

One cannot read Judge Pence's brief without wondering why it is so all fired important to subject petitioner to three trials at once. We suggested the possibility that the order was a weapon which, under the guise of judicial administration, was designed to force petitioner to settle these cases for an exhorbitant amount. After reading Judge Pence's brief we have no reason to alter our conclusion in this regard. If anything, his advocacy of the position of plaintiffs, the real parties in interest, serves to underscore the need for corrective action from this Court. In view of the importance of the questions presented, petitioner joins respondent in his request for oral argument.

Respectfully submitted,

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Dated: March 19, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

George W. Jansen

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
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COUNTY OF SAN DIEGO)

WAYNE M. PITLUCK, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above-entitled actions; that affiant's business address is 110 Laurel Street, San Diego, California 92101; that on the 19th day of March, 1968, affiant served PETITIONER'S BRIEF IN RESPONSE TO THE BRIEF OF THE TRIAL JUDGE on the parties by placing a true copy thereof in an envelope addressed to the following judge and attorneys of record representing parties in the actions herein:

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Cucamonga County Water District
Davis, City of
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District
Eastern Municipal Water District
East Niles Community Services
District
El Dorado Hills County Water
District
El Segundo, City of
Elsinore Valley Municipal Water
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Escondido, City of
Estero Municipal Improvement
District
Eureka, City of
Exeter Irrigation District
Fair Oaks Irrigation District
Fallbrook Public Utility Distric
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Fullerton, City of
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Gilroy, City of
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Hawthorne, City of
Hayward, City of
Huntington Beach, City of
Huntington Park, City of
Inglewood, City of
Ivanhoe Irrigation District
La Canada Irrigation District
Laguna Beach, City of
Laguna Beach County Water Distri
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Lakewood, City of
La Mesa, City of
La Presa County Water District
Las Virgenes Municipal Water
District
Lindmore Irrigation District
Lindsay-Strathmore Irrigation
District
Littlerock Creek Irrigation Dis
Los Altos, City of
Lower Tule River Irrigation Dis
Manhattan Beach, City of
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Merced, City of
Modesto, City of
Monrovia, City of
Morgan Hill, City of
Mountain View, City of
Nevada Irrigation District
Newport Beach, City of
North Marin County Water District
Northridge Park County Water District
Oakdale Irrigation District
Oakland, City of
Oakley County Water District
Oceanside, City of
Olivenhain Municipal Water District
Ontario, City of
Orange, City of
Orange County, County Sanitation District No. 1 of
Orange County, County Sanitation District No. 2 of
Orange County, County Sanitation District No. 3 of
Orange County, County Sanitation District No. 5 of
Orange County, County Sanitation District No. 6 of
Orange County, County Sanitation District No. 7 of
Orange County, County Sanitation District No. 11 of
Oroville-Wyandotte Irrigation District
Otay Municipal Water District
Oxnard, City of
Paradise Irrigation District
Pajaro Storm Drain Maintenance District
Palmdale Irrigation District
Pasadena, City of
Pittsburg, City of
Plain View Water District
Pleasant Valley County Water District
Porterville, City of
Poway Municipal Water District
Ramona Municipal Water District
Redding, City of
Redlands, City of
Regents of the University of California, The
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Rincon Del Diablo Municipal Water District

(Continued)

Roseville, City of
Sacramento, City of
San Bernardino, City of
San Bernardino, Board of Water Commissioners of City of
San Bernardino, County of
San Bernardino County Flood Control District
San Buenaventura, City of
San Jose, City of
San Leandro, City of
San Luis Obispo, City of
San Luis Water District
San Marcos County Water District
San Mateo, City of
San Mateo, County of
Santa Ana, City of
Santa Clara, City of
Santa Cruz, City of
Santa Cruz, County of
Santa Maria, City of
Santa Monica, City of
Santa Rosa, City of
Santa Ynez River Water Conservation District
Saucelito Irrigation District
Seal Beach, City of
Solano Beach Sanitation District
Solano Irrigation District
Sonoma Valley County Sanitation District
South Park County Sanitation District
South San Francisco, City of
South San Joaquin Irrigation District
South Sutter Water District
Spring Valley Sanitation District
Sunnyvale, City of
Terra Bella Irrigation District
Thermalito Irrigation District
Torrance, City of
Tulare, City of
Ukiah, City of
Union Sanitary District
United Water Conservation Distric
Upland, City of
Vacaville, City of
Vallejo, City of
Vallejo Sanitation and Flood Con
District
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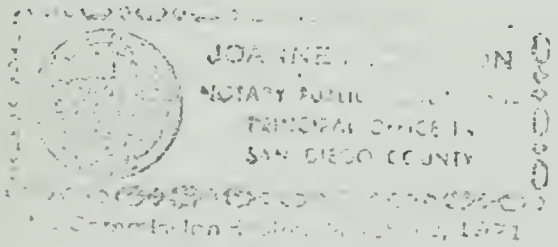
and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office mail box at San Diego, California.

Executed on March 19, 1968, at San Diego, California.

Wayne M. Pitluck

Subscribed and sworn to before me
this 19th day of March, 1968.

Joanne M. Denson
Notary Public in and for
said County and State.



Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577A, 22578 A-C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN PIPE AND CONSTRUCTION CO.,

Appellant,

vs.

THE STATE OF CALIFORNIA, *et al.*,

Appellees.

On Appeal From the United States District Courts for The: Northern District of California, Central District of California, Southern District of California, Western District of Washington, and District of Oregon.

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TABLE OF AUTHORITIES CITED

Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577A, 22578 A-C

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REPLY BRIEF FOR THE APPELLANT.

This brief is submitted by appellant in reply to the Brief for the Appellees.

Supplemental Statement of the Case.

Appellees' brief, which does not contain a citation to a single case and which contains a total of three record references,[1] relies almost exclusively on certain

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[1]Appellees' brief, in disregard of Rule 18 of this Court, contains many statements (without record references) which purport to be based on the record but which, in fact, are erroneous. Due to the press of time caused by the accelerated briefing schedule, appellant can only correct those which are egregious. Similarly, appellant refuses to engage, as appellees have done, in vitriolic name calling. Instead, this reply brief will be directed to the issues before the Court.

revisions of the challenged order which, according to appellees, were "adopted" by Judge Pence on February 23, 1968.[2] Consequently, it is incumbent upon appellant to supplement the statement of the case.

Appellees (Ap. Br. p. 2, f.3) state that there is no record support for appellant's assertion that these cases were "channeled by the Chief Judge of this Court and by the Chief Judges of the various districts involved to Judge Martin Pence . . . *for all further proceedings* . . ." therein (Op. Br. pp. 3-4).[3] As a matter of fact, however, the record compels appellant's conclusion. For example, the Chief Judge of the Northern District of California entered an assignment order (App. pp. 24-25) which transferred all cases then pending in that District to Judge Pence who has been ". . . designated to sit in this district for all proceedings in said cases by the Honorable Richard H. Chambers . . ." If appellant is in error in this regard, so is Judge Pence as indicated by the following exchange:

> "Mr. Ferguson: [appellees' counsel] The three judge portion of it is really not your Honor bringing in three judges. These cases have been pending in the courts of these two other judges. These courts have had jurisdiction of these cases from the time they were filed.

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[2]On February 21, 1968, Judge Pence announced his intention to enter, over appellant's objection, Paragraph 26 of Pretrial Order No. 15. However, appellant did not receive a copy of said order which was entered on February 26th until March 1, 1968. So also, on February 23rd, appellant's consent was sought and obtained by Judge Pence to his filing of an *amicus curiae* brief in these appeals (See Ex. A). As of March 1st, appellant had not received a copy of said *amicus* brief.

[3]"Op. Br. pp. ...." refers to appellant's brief. "Ap. Br. p. ...." refers to appellees' brief.

These cases were filed in—some of these cases were filed in the districts of each of these other two judges.

It's true that your Honor was appointed to supervise the pretrial discovery.

The Court: Oh, no. It [the order] said that it [the cases] had been assigned to me for all purposes.

Mr. Ferguson: Well—

The Court: Not just for supervision." [Tr. Jan. 12, 1968 pretrial conference, p. 22; see also p. 81].

Appellees would have this Court believe that Judge Pence never did and has not now ordered that three trials would be conducted at the same time. Although it is unnecessary to stray from the face of the challenged order, the following exchange which occurred at the December 14, 1966, pretrial conference, is illuminating:

"The Court: Well, I can say that if we decide, if this court decides that all these cases will be tried simultaneously or practically simultaneously, you are going to have to split yourself into three personalities and be in three different locations at one time.

Mr. Jansen: [counsel for appellant] Well, that I think is impossible.

The Court: Well, if it is impossible, you—if we do decide that it is going to be tried that way, you are going to have to decide which one you are going to try." (App. p. 248).[4]

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[4]Subsequently, on February 21, 1967, Judge Pence first entered an order which on its face would require appellant to proceed on three fronts at once.

Appellees do *not* contend that Paragraph 26 of Pre-Trial Order No. 15 is really different from the old order. Instead, they say that the new order has "considerably clarified" and "made more explicit" the challenged order (Ap. Br. p. 5). A legislative copy of the two orders[5] reveals that, while some minor details may have been clarified, the basic vice remains. In other words, there has been a change in form but not in substance. Despite appellees' "issue" set forth as 1(b) (Ap. Br. p. 6) which is that "The challenged order is now moot," their argument concedes that "pretrial order No. 15 . . . embodies the same concept." as No. 14 and that the appeal is *not moot* (Ap. Br. p. 8).[6] The concept of "three overlapping trials" is not a cure—it does not even lessen the pain. Under the prior order, there was the possibility—however remote—that the case which started first would be well advanced before the other commenced. Now, the first case will begin on or before June 24, 1968, and each successive case will commence thereafter at intervals of "not less than" two weeks. Prior to the entry of Pre-Trial Order No. 15, it was necessary for appellant to delve into the record to establish that the simultaneous trials were not accidental,

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[5]The legislative copy of the two orders is appended as Exhibit B hereto.

[6]Once again, appellees have raised a red herring by charging that appellant sought appellate review for purpose of delay. Appellant has met every deadline established by the trial court (with one exception caused by a major operation undergone by appellant's lead counsel.) So also, it was appellant who proposed in this Court the accelerated briefing schedule and a modified stay order which would permit discovery and other proceedings to continue in the trial court. Since the entry of this Court's February 5th order, appellant has taken a four-day deposition of appellees' primary economic expert (over the objection of appellees who sought delay). In addition, the trial court on February 20-21, 1968, held a two-day pretrial conference and ruled on many important matters.

but were deliberately planned. Now, there can be no mistake—Judge Pence's determination to force concurrent trials evidences that, absent guidance and direction from this Court, he has a closed mind on this subject.[7]

The sheer concept of "orderly processing of three overlapping trials" of complex cases[8] staggers the imagination and the conversion of the three judge panel into a group composed of Judge Pence and two consultants who are present but not presiding is a meaningless change in form which does not go to the heart of the problem. If the purpose of the three judge panel was to avoid conflicts in rulings (Ap. Br. p. 3), are we now to assume that Judge Pence will make binding rulings on crucial matters which will apply to the trial of all the cases?

Pre-Trial Order No. 15 does contain one new item *viz.* at the proposed meeting of the three judges Judge Pence will "(f) take such action as is necessary for transfer or assignment of the designated cases to such judges."[9] This leaves everyone in the dark as to how the transfer will be accomplished but we will assume, *arguendo,* that it will be accomplished in a proper manner.

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[7]Moreover, the finality of Judge Pence's determination in this regard is established by his proposed *amicus curiae* brief. Although said brief was not received before this reply brief went to the printer, the fact that one will be filed is rather extraordinary to say the least.

[8]Appellee's brief (p. 2) indicates they will offer proof of some 2,200 purchase transactions, approximately 250 witnesses are involved and plaintiffs rely upon thousands of documents.

[9]Previously the proposed trial sites were Seattle, San Francisco and Los Angeles (App. p. 244). Sub-paragraph (e) of Paragraph 26 indicates that San Diego will now be considered as a trial site.

I.

Appellees Do Not Deny That the Challenged Order Will Cause Prejudice to Appellant; They Merely Assert That They Also May Be Prejudiced.

Appellees do not dispute the showing made by appellant (Op. Br. pp. 13-16) of the many prejudicial results which necessarily will flow from the challenged order. Instead, they argue (Ap. Br. p. 7) that they will be faced with the same problems and, in fact, the impact on them would be more severe. This begs the question. The fact that *they* are willing to gamble that somehow they will receive a fair trial does not mean that appellant should be precluded from seeking assurance that its vital rights will not be impaired.

Furthermore, appellees' concession that the challenged order would have an equal or even greater impact on them highlights the plight of appellant. As we observed (Op. Br. p. 6), the various plaintiffs below are represented by a battery of at least 20 groups of counsel who have been engaged in these cases for years.[10] Obviously, the many problems posed by the order cannot be solved merely by engaging additional counsel.

Appellees' response to the problem relating to the document depository (Op. Br. p. 16) is that it would be a problem regardless of the method of consolidation (Ap. Br. p. 8, n. 6). Quite obviously, this is incorrect. A single consolidated trial in Los Angeles would obviate the problem entirely, and, if the trials were held in sequence, the documents could be moved from site to site.

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[10]Appellees do not deny this fact in their brief. We respectfully refer the Court to the affidavit of service which accompanies this brief for a listing of counsel and their respective clients.

Appellees argue (p. 12) that the impact on appellant of undergoing three trials at once should be lessened because it has had sixteen months to prepare therefor. In the first place, it was not until February 21, 1967, that Judge Pence first decided to hold simultaneous trials and, even as late as June 12, 1967, he indicated that he might reconsider the matter (App. p. 267). Secondly, ample time to prepare for multiple concurrent trials could never overcome the serious handicaps which appellant will face *at trial* (Op. Br. pp. 14-16).

Finally, appellees take exception to the statement in our opening brief that "American selected a single economic expert . . ." and assert that appellant has "at least as many expert witnesses on this case (sic) as do appellees" (Ap. Br. p. 7, n. 6). During the week of February 12, 1968, appellant took the deposition of appellees' chief expert.[11] He testified that he was assisted in the preparation of his price study by a statistician, an engineer and by five computer analysts and programmers. Appellant learned for the first time that none of these experts is completely familiar with the fields of expertise of the others. Hence, it appears that each of these experts will testify on appellees' behalf if the testimony of any is to be admitted. Therefore, appellant in the immediate future will indeed be forced to engage equivalent experts in these various technical fields.[12] This points up the unworkable, unnecessary and prejudicial nature of the order. Each of appellant's experts must be present during the presenta-

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[11]Appellee Washington Public Power Supply System has its own group of experts.

[12]To illustrate, appellees' computer data are written in Fortran —a specialized computer language which is not utilized or even understood by all computer experts, much less by lawyers.

tion of plaintiffs' case to provide counsel with information for cross-examination. Such information would be relatively meaningless to a trial attorney who was not familiar with these extremely technical aspects of the case.

II.

Consolidation Can Be Effected Provided That It Does Not Cause Prejudice.

Appellant has never opposed appropriate consolidation—even consolidation which transcends district boundaries. As noted in its opening brief, appellant suggested two alternatives to the concept of a three ring trial. It proposed either (a) consolidation so as to permit three trials *in sequence* before Judge Pence or (b) a single conolidated jury trial on the issue of liability before Judge Pence to be followed, if necessary, by a trial of the damage issue before Judge Pence without a jury. Appellees proposed seven separate trials (three simultaneous trials, followed by three more simultaneous trials and finally by a single trial). Under appellees' formula, three cases would be tried by Judge Pence. Thus, appellant's workable proposals would have resulted in judicial economy and savings of time. Despite the fact that all plaintiffs now claim damages flowing from an alleged single common conspiracy, these proposals were rejected out of hand in favor of a program which, appellees now concede, presents many grave problems to both sides and which will not reduce the trial time. Appellees' claim (Ap. Br. p. 9) that no one "could conceivably claim that these cases could all be tried separately, without considerable overlapping." The short answer to this is that Judge Pence believed it was

possible before he decided to put three fires to appellant's feet at one time.[13]

Appellant has never insisted that each of the 27 cases be separately tried. It has consistently urged the adoption of any formula—including complete consolidation—which would avoid the severe prejudice inherent in the program of appellees and the trial court. Appellees are in a strained position. They urge that the order be affirmed despite the grave complications which it will cause. Yet, they reject any other plan of consolidation which would overcome these problems.

Appellees profess to see an inconsistency between appellant's need to attack deliberately planned simultaneous trials and its statement that it would not be in this Court if *coincidentally* each of the 27 cases had proceeded to trial simultaneously. What appellant is saying is that if each case had been handled in a *normal* fashion within each district and if (despite the long odds) by happenstance all were ready for trial simultaneously, it could not complain. Appellant is here because the cases under the guidance of this Court were scrambled together in an extraordinary fashion in the interests of justice and its administration, and are now being separated in an extraordinary fashion in the interest of forcing this small defendant to its knees. In a situation such as this, the cases should either remain scrambled or be unscrambled with extreme care and with due regard for the right of a defendant to present a defense free from arbitrary and highly prejudicial administrative procedures.

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[13]In October, 1966, a tentative trial plan was established which contemplated four trials with reasonable respites in between each one.

Appellees, in blithe disregard of the requirements of paragraph 3[14] of Rule 18 of the Rules of this Court, inject certain aspects of the "electrical cases" into their argument (Ap. Br. pp. 10, A-1).

There being absolutely nothing in the records of these cases, either in this Court or below, to support appellees' unsubstantiated assertions, appellant could disregard them.[15] However, this Court may wish a response to that matter, no matter how improperly it was presented, and appellant has no hesitancy in providing it, with appropriate source references.[16]

The so-called "electrical equipment cases" consisted of approximately nineteen hundred (1900) separate treble damage actions filed in thirty-five (35) separate judicial districts throughout the United States in the 1961-1963 period. Insofar as appears in the referenced study, none of those nineteen hundred cases was consolidated with any other at the pre-trial stages and separated at trial time. To the contrary, the Co-ordinating Committee for Multiple Litigation established by Chief Justice Warren made it crystal clear throughout its existence that the committee had no intention of making *rulings*, as opposed to recommendations, in the myriad

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[14]Rule 18, paragraph 3 incorporates with regard to appellees' brief paragraph 2(e) of the same rule, which requires a "precise argument of the case . . . exhibiting a clear statement of the points of law or facts to be discussed, *with a reference to the pages of record and the authorities relied upon in support of each point.*" (Emphasis supplied).

[15]See, *e.g.*, *Smith v. United States*, 343 F.2d 539, 541 (5th Cir. 1965), *cert. denied*, 382 U.S. 878 (1965); *Chesapeake & Ohio Ry. Co. v. Greenup*, 175 F.2d 169, 171 (6th Cir. 1949); *Bono v. United States*, 113 F.2d 724, 725 (2d Cir. 1940).

[16]The information hereafter is found in CCH 1966 New York State Bar Association Antitrust Law Symposium (hereafter "CCH 1966 Antitrust Law Symposium") at pp. 55-90. The study there contained is copiously authenticated.

of cases. As Judge Byrne, a member of the Co-ordinating Commiteee, said:

> "I have no jurisdiction again I say, to sit here and determine anything. I only have it when I am sitting in my own district."[17]

What did occur in some of the electrical equipment cases was *consolidation for trial after* they had proceeded in pre-trial as individual, albeit partially coordinated, cases in their own districts.[18]

Thus, taking appellees' unauthenticated statements at face value, it is hardly surprising or shocking that of some nineteen hundred cases filed in thirty-five districts, three or four would come to trial in widely separated districts within the same 30-day period. What is surprising is appellees' attempt to sustain the calculated effort of the trial court in the twenty-seven cases at bar by reference to the unintentional occurrences in the nineteen hundred electrical equipment cases.[19]

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[17]Transcript of Proceedings in the Electrical Equipment Antitrust cases, W.D. Tex., Feb. 6, 1963, at 5, cited in CCH 1966 Antitrust Law Symposium at 61.

[18]CCH 1966 Antitrust Law Symposium at 76.

[19]Another aspect of appellees' brief is equally or perhaps even more surprising. That is their utter distortion of the record on a point, however irrelevant it may be to this appeal, upon which appellees seem to place great reliance. At three separate points in their brief, appellees assert that appellant has saved $500,000 per year or more by the procedures adopted in these cases (Ap. Br. p. 8, n. 5; p. 10, n. 7; p. 12). They rely upon a statement by appellant's general counsel, Mr. Jansen, that he came into these cases in the interest of saving, if possible, some of the then current $500,000 per year which appellant was spending in the defense of these cases (App. pp. 247, 248).

Certain savings in appellant's litigation expenditures have occurred (see p. 43, petition for writ of mandamus, Case No. 22336), not by a reduction in the number of counsel devoted to appellant's defense, as appellees insinuate, but by effecting certain

(This footnote is continued on the next page)

III.

This Court Has Rendered No Decision Regarding The Validity of the Appeal.

Instead of providing any assistance to the Court on the applicability of the collateral order doctrine, appellees cavalierly presume that this Court has decided that an appeal will not lie as a matter of law. Appellees' reluctance to face this important issue is as understandable as it is inexcusable. Without response by appellees, however, appellant can only reiterate its contention expressed in Point III of its opening brief that the order here in question is reviewable on appeal as well as on mandamus.

Conclusion.

Regardless of the descriptive term which is used (*e.g.* simultaneous, practically simultaneous, overlapping or concurrent) it is plain that the trial court is determined to force appellant to undergo three trials at once. In the unique circumstances present here, this is a clear abuse of discretion and an order should be entered directing Judge Pence to vacate the challenged order.

Respectfully submitted,

George W. Jansen,
James O. Sullivan,
Wayne M. Pitluck,
Paul B. Wells,
Attorneys for Appellant, American Pipe and Construction Co.

Dated: March 4, 1968.

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efficiencies in that defense. It is appellant's position that no addition of counsel and no amount of increased expenditure could alleviate the prejudice which it would suffer under the simultaneous trial procedure from which it appeals.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

George W. Jansen

EXHIBIT "A."

American Pipe and Construction Co.
Corporate Headquarters:
400 South Atlantic Boulevard
Monterey Park, California 91754

Please reply to:
110 Laurel Street
San Diego, California 92101
(714) 233-6337

February 24, 1968

Hon. Martin Pence, Chief Judge
United States District Court
District of Hawaii
U.S. Courthouse and Post Office
Honolulu, Hawaii

Re: American Pipe and Construction Co. v. The State of California, et al
U.S. Court of Appeals, Ninth Circuit
Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577 A, 22578 A-C.

Dear Judge Pence:

Pursuant to your request, I am happy to consent on behalf of appellant American Pipe and Construction Co. to the filing of a brief amicus curiae by you in the above captioned matter. This consent is pursuant to the provisions of Rule 18.-9.(a).

Respectfully yours,
GEORGE W. JANSEN

GWJ:mmj

EXHIBIT "B."

Legislative Copy of the Orders.

[Note: Words from Paragraph 5S of Pre-Trial Order No. 14 which have been deleted from Paragraph 26 of Pre-Trial Order No. 15 have been stricken and words which did not appear in Paragraph 5S are underscored.]

"26. A pre-trial conference is set for ~~February 21, 1968~~ June 5, 1968 at 9:30 a.m. in San Francisco, California, ~~at which time trial judges~~ before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or such other judges as may be designated, ~~will preside~~ present. At such time, ~~the trial judges will~~ after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial ~~in any district or districts as may be required~~; (b) select the districts in which such trials will be held; (c) ~~select the~~ determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; ~~At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968.~~ (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of

not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:

~~(1)~~ (A) The voir dire examination;

~~(2)~~ (B) The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

~~(3)~~ (C) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

~~(4)~~ (D) Jury instructions and special interrogatories;

~~(5)~~ (E) Counsel's opening statements;

~~(6)~~ (F) The days and hours of the week during which court will be conducted;

~~(7)~~ (G) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

~~(8)~~ (H) Daily trial transcripts;

~~(9)~~ (I) A current index of the trial record;

~~(10)~~ (J) The handling of documentary evidence at trial;

~~(11)~~ (K) The scope of testimony of witnesses to be called at trial and possible limitations with respect thereto;

~~(12)~~ (L) The use of depositions, including the possible use of narrative summaries or verbatim extracts;

~~(13)~~ (M) The parties' report on their attempts to stipulate as to facts;

~~(14)~~ (N) Further pre-trial proceedings;

~~(15)~~ (O) Rulings on objections to designated deposition testimony and documentary evidence, where possible;

~~(16)~~ (P) Possibility of settlement."

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

AFFIDAVIT OF SERVICE BY MAIL

For

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND TO APPEAR AND MAKE ORAL ARGUMENT;

PROPOSED ORDER GRANTING LEAVE TO MOVANT TO FILE

BRIEF AS AMICUS CURIAE AND TO APPEAR

AND MAKE ORAL ARGUMENT;

and

BRIEF OF AMICUS CURIAE IN OPPOSITION

TO BRIEF OF APPLICANT

AFFIDAVIT OF SERVICE BY MAIL

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

JOSEF D. COOPER, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above-entitled actions; that affiant's business address is Room 310, United States Courthouse, Honolulu, Hawaii, 96810: that on the 28th day of February, 1968, affiant served MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; PROPOSED ORDER GRANTING LEAVE TO MOVANT TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; and BRIEF OF AMICUS CURIAE IN OPPOSITION TO BRIEF OF APPLICANT on the parties by placing a true copy thereof in separate envelopes addressed to the following attorneys of record representing parties in the actions herein:

John W. Riley, Esq.
Houghton, Cluck, Coughlin,
Schubat & Riley
320 Central Building
Seattle, Washington 98104

William H. Ferguson, Esq.
Ferguson & Burdell
929 Logan Building
Seattle, Washington

George W. Jansen
James O. Sullivan
Wayne M. Pitluck
110 Laurel Street
San Diego, California 92101

Paul R. Wells
Procopio, Cory, Hargreaves
& Savitch
1900 First National Bank Bldg.
San Diego, California 92101

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office mail box at Honolulu, Hawaii.

Executed on February 29, 1968, at Honolulu, Hawaii.

Josef D. Cooper
JOSEF D. COOPER

Subscribed and sworn to before me
this 29th day of February, 1968.

Albert Grain
Notary Public in and for said
County and State

NOTARY PUBLIC
First Judicial Circuit
State of Hawaii
My commission expires: Nov. 21, 1969

No. 22,580

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

BRIEF FOR THE RESPONDENT.

A. CALDER MACKAY,
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Los Angeles, Calif. 90014,
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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-0171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 22,580

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Tax Court [I-R 127-179] is reported at 48 T.C. 118.

Jurisdiction.

This petition for review [I-R 183-185] involves federal income taxes for the years 1958 through 1961. On December 24, 1964, the Commissioner of Internal Revenue mailed to the respondent a notice of deficiency, asserting deficiencies in income taxes in the aggregate amount of $318,659.72 for the calendar years 1958 through 1961. [I-R 9-36.] Within ninety days thereafter, on March 2, 1965, the respondent filed a

petition with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. [I-R 1-36.] The decision of the Tax Court was entered on August 28, 1967. [I-R 182.] The case is brought to this Court by a petition for review filed on November 17, 1967 [I-R 183-185], within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

Question Presented.

Whether the Tax Court was correct in its determination that the guaranteed renewable accident and health insurance contracts issued by respondent were "issued or renewed for periods of 5 years or more" within the purview of Section 809(d)(5) of the Internal Revenue Code of 1954.

Statute and Regulations Involved.

Internal Revenue Code of 1954:

Subchapter L—Insurance Companies

Part I. Life insurance companies.

* * *

PART I—LIFE INSURANCE COMPANIES

Subpart A. Definition; tax imposed.

* * *

Subpart C. Gain and loss from operations.

* * *

Subpart A—Definition; Tax Imposed

SEC. 801. DEFINITION OF LIFE INSURANCE COMPANY.

* * *

(e) Guaranteed Renewable Contracts.—For purposes of this part, guaranteed renewable life, health, and accident insurance shall be treated in the same manner as noncancellable life, health, and accident insurance.

* * *

(26 U.S.C. 1964 ed., Sec. 801(e))

Subpart C—Gain and Loss from Operations

SEC. 809. IN GENERAL.

* * *

(d) Deductions.—For purposes of subsections (b)(1) and (2), there shall be allowed the following deductions:

* * *

(5) Certain Nonparticipating Contracts.—An amount equal to 10 percent of the increase for the taxable year in the reserves for nonparticipating contracts or (if greater) an amount equal to 3 percent of the premiums for the taxable year (excluding that portion of the premiums which is allocable to annuity features) attributable to nonparticipating contracts (other than group contracts) which are issued or renewed for periods of 5 years or more. For purposes of this paragraph, the term "reserves for nonparticipating contracts" means such part of the life insurance reserves (excluding that portion of the reserves which is allocable to an-

nuity features) as relates to nonparticipating contracts (other than group contracts). For purposes of this paragraph and paragraph (6), the term "premiums" means the net amount of the premiums and other consideration taken into account under subsection (c)(1).

* * *

(26 U.S.C. 1964 ed., Sec. 809)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.801-3. Definitions.

* * *

(d) *Guaranteed renewable life, health, and accident insurance policy.* The term "guaranteed renewable life, health, and accident insurance policy" means a health and accident contract, or a health and accident contract combined with a life insurance or annuity contract, which is not cancellable by the company but under which the company reserves the right to adjust premium rates by classes in accordance with its experience under the type of policy involved, and with respect to which a reserve in addition to the unearned premiums (as defined in paragraph (e) of this section) must be carried to cover that obligation. Section 801(e) provides that such policies shall be treated in the same manner as noncancellable life, health, and accident insurance policies. * * *

* * *

(26 C.F.R., Sec. 1.801-3(d))

Sec. 1.809-5. Deductions.

(a) *Deductions allowed.* Section 809(d) provides the following deductions for purposes of determining gain or loss from operations under section 809(b)(1) and (2), respectively:

* * *

(5) *Certain nonparticipating contracts.*

* * *

(iv) * * * The determination of whether a contract meets the 5-year requirement shall be made as of the date the contract is issued, or as of the date it is renewed, whichever is applicable. Thus, a 20-year nonparticipating endowment policy shall qualify for the deduction under section 809(d)(5), even though the insured subsequently dies at the end of the second year, since the policy is issued for a period of 5 years or more. However, a 1-year renewable term contract shall not qualify, since as of the date it is issued (or of any renewal date) it is not issued (or renewed) for a period of 5 years or more. In like manner, a policy originally issued for a 3-year period and subsequently renewed for an additional 3-year period shall not qualify. However, if this policy is renewed for a period of 5 years or more, the policy shall qualify for the deduction under section 809(d)(5) from the date it is renewed.

* * *

(26 C.F.R., Sec. 1.809-5).

Statement.

The petitioner's statement of the case is largely a repetition of the facts as found by the Tax Court. Inasmuch as the respondent does not controvert any of those facts, it shall not repeat them here.

Summary of Argument.

Respondent, a life insurance company, sold a guaranteed renewable accident and health contract providing disability income benefits which was available only to insureds whose age did not exceed 59 years at date of issue. Under the terms of the contract, the insured was guaranteed the right to renew the contract for consecutive periods of one year each to age 65 by payment of the renewal premium for each such term.

It is thus apparent that respondent, under the terms of its contract, as opposed to a "1-year renewable term contract" which is *not guaranteed* renewable, could not refuse annual renewal. In substance then the contract under consideration guaranteed the insured's renewal right, not for successive one year periods, but for a period from date of issue to age 65, or for a period of five years or more.

Although respondent reserved the right to change the annual premium, its right to do so was subject to substantial limitations. Under the terms of the contract, any such change had to be made as to all insureds in the same rate class, irrespective of changes in the insured's physical condition or occupation. Re-

spondent's right to change the annual premium was further limited by circumstances beyond the control of respondent. In the first place respondent reserved the right to change the premium only if, as and when the experience for the class failed to continue as it had in the past. Thus, respondent's right to change the premium was subject to an ascertainable standard based upon its past experience. Moreover, any change in the premium was dependent upon the experience of the class under the policies issued, all of which involves external matters over which respondent has little, if any, control. In the second place, competitive forces within the insurance industry precludes any increase in the premium to any unreasonable limit.

Respondent computed the premium rates on the basis that the premium would remain level to age 65, the same as it does for a life insurance policy with a term to age 65. Respondent issued the policies on the basis that they were guaranteed renewable to age 65 and that the premium rate would remain level from date of issue to age 65 if the experience for the class continued substantially as it had in the past. In recognition of respondent's assumption of long-term risks under the contract, respondent was required by state insurance regulatory authorities to establish and maintain reserves with respect to the contracts under consideration in the same manner as was required with respect to noncancellable policies.

In addition and of greater significance Congress, by statutory definition contained in Section 801(e) of the

Internal Revenue Code of 1954, has clearly stated that guaranteed renewable life, health and accident insurance shall be treated in the *same manner* as noncancellable life, health and accident insurance. Thus, Section 801(e) requires that respondent's contracts be treated, for purposes of Section 809(d)(5), as if they were noncancellable, i.e., as if respondent was not entitled to change the premium charged for any annual renewal.

The language of Section 809(d)(5) is plain and unambiguous. It provides an alternative deduction in an amount equal to "3 percent of the premiums * * * attributable to nonparticipating contracts * * * which are issued or renewed for periods of 5 years or more". The only requirement contained therein relates to the length of time for which a nonparticipating contract must be issued, namely, five years or more. The Tax Court correctly held that the contracts under consideration are nonparticipating contracts which were issued for a period of five years or more within the meaning of Section 809(d)(5).

ARGUMENT.

The Tax Court Correctly Held That Respondent's Guaranteed Renewable Accident and Health Policies Do Qualify as "Nonparticipating Contracts * * * Which Are Issued or Renewed for Periods of 5 Years or More" and, Therefore, Premiums Attributable to Them Are Includible in Computing the Alternative Deduction Provided by Section 809(d)(5) of the 1954 Code.

A. The Nature and Provisions of the Insurance Contracts Involved.

There is no dispute as to the provisions of the insurance contracts involved on this review. All of the provisions of a typical contract are contained in Exhibit 29-AC which is characterized as a "Guaranteed Renewable Income Protection Policy". The contracts provided disability income benefits and were issued only to those persons who were 59 years of age or less at the date of issue. [I-R 173; II-R 93.] Under the terms of such policy, the insured was given the right to renew the policy for consecutive periods of 1 year each to age 65 by payment of the renewal premium for each such term. [I-R 173; Ex. 29-AC.] Respondent, as the insurer, reserved the right to change the renewal premium on the basis of its applicable rate tables in effect on the due date provided that (1) no change was made in the rate tables applicable to the insured's policy unless such change was also made applicable to all policies providing like benefits and renewal rights and in the same rating class; (2) the rating class of the insured's policy was not changed because of any change in the insured's status, such as change of physical conditions or occupation; and (3) each renewal

premium was to be determined in accordance with the rating class and age of the insured at the date of issue. [I-R 173; Ex. 29-AC.]

It is apparent under the terms of such policy that the insured, at date of issue, was guaranteed the right to continue his policy in force for a period of five years or more because his age could not exceed 59 years at date of issue and he was given the right to renew the policy until age 65. It is also apparent that, during this same period of time, the respondent, as the insurer, had no right to alter or amend the provisions of the policy in any respect whatsoever or to cancel the policy except for nonpayment of the renewal premium, a right which is reserved by all insurers in all instances.

Although respondent, as the insurer, did reserve the right to change the amount of the renewal premium, any such change had to be made as to all insureds in the same rate class. In addition and of greater significance to the insured the contract provided that the rating class of his policy could not be changed because of any change in his physical condition or occupation and each renewal premium was to be determined in accordance wth the rating class and age of the insured at the date of issue.

Respondent, as the insurer, computed the premium rates on the policies on the basis that the premium would remain level to age 65, the same as it does for a life insurance policy with a term to age 65. [I-R 173; II-R 93-94.] In order to provide a premium which would remain level from date of issue to age 65, respondent, as the insurer, computed its premium rates for the policies here material on the basis of past ex-

perience and calculations, taking into consideration the fact that it would be necessary to set aside a portion of the premium received during the early policy years to offset the higher costs of insurance in later years as the insured approached age 65. [II-R 94.]

The policies here material were issued for a guaranteed period of not less than five years and for guaranteed periods substantially in excess of five years depending upon the age of the insured at date of issue which could not exceed 59 years. [II-R 93-94.] It is thus apparent that respondent, as the insurer, computed its premium rates based on past experience and the assumption of long-term risks for periods substantially in excess of five years. [II-R 93-94.]

Respondent sold the policies here material to insureds on the basis that they were guaranteed renewable to age 65 and that the premium rate would remain level from age at date of issue to age 65 if the experience continued substantially as it had in the past. [II-R 94.]

Section 997(b) of the Insurance Code of the State of California, provides in part as follows:

> "(b) Every admitted insurer which issues one or more of the following three types of individual disability policies shall maintain a reserve not less than the minimum reserve required under the provisions of this subsection (b):
>
> (1) Policies which are guaranteed renewable for life or to a specified age at guaranteed premium rates.
>
> (2) Policies which are guaranteed renewable for life or to a specified age but under which the insurer has reserved the right to change the scale of premiums."

Thus, it was necessary for respondent, as the insurer, to establish and maintain reserves with respect to the guaranteed renewable accident and health policies here material on the same basis as was required with respect to noncancellable policies providing guaranteed premium rates. [I-R 95.]

B. The Special Deduction Provided by Section 809(d)(5) and the Requirement That Premiums Included Be Attributable to Contracts "Issued or Renewed for Periods of 5 Years or More".

The language of Section 809(d)(5) is plain enough. It allows a life insurance company an alternative deduction in computing its gain or loss from operations equal to "3 percent of the premiums * * * attributable to nonparticipating contracts * * * which are issued or renewed for periods of 5 years or more". Section 809-(d)(5) of the Internal Revenue Code of 1954, *supra*.

A nonparticipating insurance contract is one wherein the policyholder has no right to participate in the divisible surplus of the company. Section 1.809-5(a)-(5)(ii), Treasury Regulations on Income Tax (1954). The contracts under consideration are nonparticipating insurance contracts. [Ex. 29-AC.] The sole question presented, therefore, is whether the contracts under consideration were "issued or renewed for periods of 5 years or more" within the purview of Section 809(d)(5) of the Internal Revenue Code of 1954.

The Senate, in discussing the minimum five-year requirement, stated (S. Rep. No. 291, 86th Cong., 1st Sess., p. 55 (1959-2 Cum. Bul. 770, 810)):

> "* * * The determination of whether a contract meets the 5-year requirement will be made as of

the date it was issued, or as of the date it was renewed, whichever is applicable. Thus, a 20-year nonparticipating endowment policy will qualify under section 809(d)(5), even though the individual insured subsequently dies at the end of the second year, since the policy was issued for a period of 5 years or more. *However, a 1-year renewable term contract will not qualify, in that, as of the date it was issued (or of any renewal date) it was not issued (or renewed) for a period of 5 years or more.* In like manner, a policy originally issued for a 3-year period and subsequently renewed for an additional 3-year period will not qualify. However, if this policy were renewed for a period of 5 years or more, the policy would qualify under section 809(d)(5) from the date it was renewed. * * *" (Emphasis added.)

It is apparent from the language contained in Section 809(d)(5) and the Senate Report that any nonparticipating contract (other than a group contract) which meets the five-year requirement as of the date of issue, or renewal, whichever is applicable, will qualify for the benefits of that section. The only limitation contained therein relates to the length of time for which the policy is issued or renewed. There is no express or implied requirement contained therein that the premium attributable to such contracts remain fixed.

Although a "1-year renewable term contract" does not qualify for the deduction, a contract which guarantees the right of the insured to coverage for a period of five years or more clearly does qualify.

C. The Tax Court Correctly Held That Respondent's Contracts Were Issued for Periods of Five Years or More Within the Purview of Section 809(d)(5).

The contracts under consideration were issued only to those persons who were 59 years of age or less on the date of issue. Although the contracts were issued for an initial term of one year, the insured was guaranteed the right to renew the policy for consecutive terms of one year each to age 65 by the mere payment of the annual renewal premium. Thus, it is apparent under the terms of such policy that the insured, at date of issue, was guaranteed the right to continue his policy in force for a period of five years or more because his age could not exceed 59 years at date of issue and he was given the right to renew the policy until age 65. Correspondingly, during this same period of time, the respondent, as the insurer, had no right to alter or amend the provisions of the policy in any respect whatsoever or to cancel the policy except for nonpayment of the renewal premium, a right which is reserved by all insurers in all instances. Although respondent, as the insurer, reserved the right to change the renewal premium, any such change had to be made as to all insureds in the same rate class, irrespective of any changes in the insured's physical condition or occupation. Thus, at date of issue, an insured could continue his policy in force for a period of "five years or more" by the timely payment of his renewal premium. Hence, the contracts under consideration do meet the five-year test for qualification.

Petitioner contends on pages 17 to 21 of his brief that the contracts under consideration are indistinguishable from a "1-year renewable term contract"

which the Senate Report, *supra,* states specifically will not qualify for the deduction. (P. 55, 1959-2 Cum. Bul., p. 810.) In rejecting this same contention, the Tax Court in the present case was eminently sound when it concluded as follows [I-R 178-179]:

> "While we do not question the fact that petitioner retained the right to alter renewal premiums on the contracts in question, we note, as set forth in our findings, *supra,* that those contracts imposed substantial limitations on such premium changes. In addition and of greater significance in distinguishing petitioner's guaranteed renewable contracts from the 1-year renewable term contracts referred to in the above-quoted Senate committee report, is the fact that, under the former contracts, petitioner guaranteed the renewal of the policies and all their provisions for a period of 5 years or more. Thus, the only way the term of petitioner's guaranteed renewable contracts could have been shortened to less than 5 years was for an insured to either voluntarily cancel his policy or fail to make timely premium payments thereon. Since these possibilities are within the exclusive control of the insured and exist not only with regard to petitioner's guaranteed renewable contracts but with virtually all insurance contracts 'issued or renewed for a period of 5 years or more,' we think the insurance contracts in question satisfy the statutory definition of section 809(d)(5) in that they are, in essence, 'issued * * * for periods of 5 years or more.' The 1-year option guarantee is not a 'renewal' but rather part and parcel of the original insurance contract. The insured's coverage un-

> der the contract continues for the full 5-year period subject only to petitioner's right to increase annual premiums within stated limits. In substance, the contract guarantees the insured's 'renewal' right, not for 5 successive yearly periods, but for one 5-year period with the right in petitioner to alter the premium. * * *"

It must be recognized that respondent, in the case of its guaranteed renewable contract, as opposed to a "1-year renewable term contract" which is *not guaranteed* renewable, cannot refuse annual renewal. Thus, in substance, the contract under consideration guarantees the insured's "renewal" right, not for successive one year periods, but for a period (from date of issue to age 65) of five years or more with the right in respondent to change the annual premium.

Although respondent did reserve the right to change the annual premium, any such change had to be made as to all insureds in the same rate class. In addition and of greater significance to the insured the rating class of his policy could not be changed because of any change in his physical condition or occupation and each renewal premium was to be determined in accordance with the rating class and age of the insured at the date of issue. [Ex. 29-AC.] The Tax Court correctly held that these limitations were indeed substantial. [I-R 178.]

Petitioner contends on pages 9 to 10 and 18 to 21 of his brief that the right to change the annual premium is tantamount to the right to force termination of coverage. In doing so petitioner ignores reality and the very nature of the contracts under consideration and the very basis upon which these contracts were sold

to the general public in the ordinary course of respondent's insurance business.

Respondent did not reserve an absolute right to arbitrarily increase the annual premium. A guaranteed renewable accident and health contract is defined in petitioner's Regulations to mean a contract which is *not cancellable* by the company but under which the company reserves the right to adjust premium rates by classes *in accordance with its experience* under the type of the policy involved. Section 1.801-3(d), Treasury Regulations of Income Tax (1954).

Pursuant to the contracts under consideration respondent reserved the right to change the annual premium only, if, as and when the experience for the class failed to continue as it had in the past. [II-R 94.] It is thus apparent that respondent's right to change the premium was subject to an ascertainable standard based upon its past experience. Moreover, any change in the premium contemplated by the respondent and the insureds was dependent upon the experience of the class under the policies issued, all of which involves external matters over which respondent has little, if any, control.

In addition any proposed increase in premium is necessarily limited by competitive forces in the insurance industry. For example, although experience on a given policy may be poor, certain lives will be good risks and other lives poor risks. If the rate is increased to an unreasonable level, a substantial portion of the good risks will obtain insurance coverage elsewhere and leave the insurer with predominantly poor risks. The result will be an even poorer loss ratio than existed before the rate increase.

Moreover, respondent computed the premium rates on the policies on the basis that the premium would remain level to age 65, the same as it does for a life insurance policy with a term to age 65. [I-R 173; II-R 93-94.] In order to provide a premium which would remain level from date of issue to age 65, respondent computed its premium rates on the basis of past experience and calculations, taking into consideration the fact that it would be necessary to set aside a portion of the premium received during the early policy years to offset the higher costs of insurance in later years as the insured approached age 65. [II-R 94.]

The policies here material were issued for guaranteed periods of not less than five years and for periods substantially in excess of five years depending upon the age of the insured at date of issue, which could not exceed 59 years. [II-R 93-94.] It is thus apparent that respondent computed its premium rates based on past experience and the assumption of long-term risks for periods substantially in excess of five years, namely, from date of issue to age 65, the same as it does for a life insurance policy with a term to age 65. [II-R 93-94.]

Likewise, Respondent sold the policies here material to insureds on the basis that they were guaranteed renewable to age 65 and that the premium rate would remain level from date of issue to age 65 if the experience continued substantially as it had in the past. [II-R 94.]

Respondent is engaged in the insurance business, which depends in large part upon the insured's trust and confidence in the integrity and financial responsibility of the insurer. Having issued a policy on the

basis that it was guaranteed renewable to age 65 and that the premium would remain level until age 65 providing the experience for the class continued as it had in the past, it is unreasonable to conclude that respondent's right to change the premium is tantamount to the right to force a termination of coverage. Respondent wishes to continue, not liquidate, its insurance business.

Petitioner contends on pages 7, 9 to 10 and 18 to 21 of his brief that respondent is free, by reason of its right to change the premium, to shift, after one year, any increase in the risk to the insureds as a class and that such a right precludes the contracts from qualification for the deduction.

Respondent respectfully submits that, for the reasons stated above, its right to change the premium is subject to substantial limitations. It must also be recognized that respondent did indeed assume long-term risks which were not cancellable by it and for periods substantially in excess of five years. [I-R 173; II-R 93; Ex. 29-AC.] Thus, the premium rates were calculated, and the contracts were issued, on the basis that the premium would remain level from date of issue to age 65, or for a period substantially in excess of five years, providing the experience thereunder continued as in the past. [I-R 173; II-R 93-94.]

Moreover, respondent sold the policies here material to insureds on the basis that they were guaranteed renewable to age 65 and that the premium rate would remain level from date of issue to age 65 if the experience continued substantially as it had in the past. [II-R 94.] Under the circumstances it is apparent that respondent intended, and did in fact, assume risks for a period of five years or more.

In recognition of respondent's assumption of long-term risks under the contract, respondent is required by state insurance regulatory authorities to establish and maintain its reserves with respect to the contracts under consideration in the same manner as was required with respect to noncancellable policies, providing guaranteed premium rates. [I-R 95; Section 997(b) of the Insurance Code of the State of California.]

Recognizing the industrywide treatment of guaranteed renewable insurance contracts as noncancellable contracts, Congress enacted Section 801(e) which provides that:

> "(e) Guaranteed Renewable Contracts.—For purposes of this part, guaranteed renewable life, health, and accident insurance shall be treated *in the same manner* as noncancellable life, health, and accident insurance." (Emphasis added.)
>
> (26 U.S.C. 1964 ed., Sec. 801(e).)

Petitioner contends on pages 21 to 24 of his brief that this definition has meaning only insofar as it relates to *reserves* and the primary formula under Section 809(d)(5) which is based upon reserves. However, Section 801(e) plainly states that the definition provided shall apply "for purposes of this *part*" (emphasis added) which includes *all* of the sections relating to the taxation of life insurance companies. More specifically Section 801(e) is contained in Part I of Subchapter L and Section 809(d)(5) is similarly contained in Part I of Subchapter L. It is submitted, therefore, that Congress intended respondent's guar-

anteed renewable accident and health contracts should be accorded the same treatment as any noncancellable accident and health contract for purposes of the alternative formula under Section 809(d)(5) based upon "an amount equal to 3 percent of * * * premiums * * *", providing the contracts were issued for five years or more. Any other interpretation ignores the plain meaning of the statute.

In addition and of greater significance is the fact that the language of Section 809(d)(5) is plain and unambiguous. It allows an alternative deduction equal to "3 percent of the premiums * * * attributable to nonparticipating contracts * * * which are issued or renewed for periods of 5 years or more". It is apparent from the language contained in Section 809(d)(5) and the Senate Report, *supra,* that any nonparticipating contract which is issued for five years or more will qualify for the benefits of that section. The only limitation contained therein relates to the length of time for which the policy is issued or renewed. There is no express or implied requirement contained therein that the premium attributable to such contracts remain fixed. Nor indeed does there appear to be any mention in the Senate Hearings or Report that the premium attributable to nonparticipating contracts must be guaranteed. The sole requirement established by Congress under Section 809(d)(5) is that a nonparticipating contract be issued or renewed for a period of five years or more. The Tax Court correctly held that respondent's

contracts were issued for periods of five years or more within the purview of Section 809(d)(5).

Conclusion.

The opinion and decision of the Tax Court were in all respects sound and should be affirmed.

Dated July 3rd, 1968.

Respectfully submitted,

A. Calder Mackay,
Richard N. Mackay,
Counsel for Respondent.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD M. MACKAY

No. 22,580

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Tax Court (I-R. 127-179) is reported at 48 T.C. 118.

JURISDICTION

This petition for review (I-R. 183-185) involves federal income taxes for the years 1958 through 1961. On December 24 1964, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency, asserting deficiencies in income taxes in the aggregate amount of $318,659.72 for the calendar years 1958 through 1961. (I-R. 9-36.) Within ninety days thereafter, on March 2, 1965, the taxpayer filed a petition with the Tax Court for a redetermination of those deficiencies under the provisions of

Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-36.) The decision of the Tax Court was entered on August 28, 1967. (I-R. 182.) The case is brought to this Court by a petition for review filed on November 17, 1967 (I-R. 183-185), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Taxpayer, a life insurance company, issues a health and accident policy for a term of one year, guaranteeing that it may be renewed from year to year thereafter upon the payment of premiums, the amounts of which will be subject to the determination of taxpayer. The single question here is whether premiums received in respect of such a policy constitute premiums attributable to insurance contracts "issued or renewed for periods of 5 years or more" within the purview of Section 809(d)(5) of the Internal Revenue Code of 1954.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 809 [as added by Sec. 2(a), Life Insurance Company Income Tax Act of 1959, P.L. 86-69, 73 Stat. 112] IN GENERAL.

* * *

(d) Deductions.--For purposes of subsections (b)(1) and (2), there shall be allowed the following deductions:

* * *

(5) Certain nonparticipating contracts.--An amount equal to 10 percent of the increase for the taxable year in the reserves for nonparticipating contracts or (if greater) an amount equal to 3 percent of the premiums for the taxable year (excluding that portion of the premiums which is allocable to annuity features) attributable to nonparticipating contracts (other than group contracts) which are issued or renewed for periods of 5 years or more. For purposes of this paragraph, the term "reserves for nonparticipating contracts" means such part of the life insurance reserves (excluding that portion of the reserves which is allocable to annuity features) as relates to nonparticipating contracts (other than group contracts). For purposes of this paragraph and paragraph (6), the term "premiums" means the net amount of the premiums and other consideration taken into account under subsection (c)(1).

* * *

(26 U.S.C. 1964 ed., Sec. 809.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.809-5 Deductions.

(a) Deductions allowed. Section 809 (d) provides the following deductions for purposes of determining gain or loss from operations under section 809(b)(1) and (2), respectively:

* * *

(5) Certain nonparticipating contracts.

* * *

(iv) * * * The determination of whether a contracts meets the 5-year requirement shall be made as of the date the contract is issued, or as of the date it is renewed, whichever is applicable. Thus, a 20-year nonparticipating endowment policy shall qualify for the deduction under section 809(d)(5), even though the insured subsequently dies at the end of the second year, since the policy is issued for a period of 5 years or more. However, a 1-year renewable term contract shall not qualify, since as of the date it is issued (or of any renewal date) it is not issued (or renewed) for a period of 5 years or more. In like manner, a policy originally issued for a 3-year period and subsequently renewed for an additional 3-year period shall not qualify. However, if this policy is renewed for a period of 5 years or more, the policy shall qualify for the deduction under section 809(d)(5) from the date it is renewed.

* * *

(26 C.F.R., Sec. 1.809-5.)

STATEMENT

The material facts as found by the Tax Court are as follows (I-R. 171-173):

Taxpayer, a life insurance company, issued a guaranteed renewable accident and health contract providing disability income benefits which was available to insureds whose age did not exceed 59 years. Under the terms of the policy , the insured was given the right to renew the policy for consecutive periods of one year each to age 65 by payment of the renewal premium for each such term. Taxpayer reserved the right to change the amount of the renewal premium on the basis

of its applicable rate tables in effect on the due date, provided, however, that (1) no change was made in the rate tables applicable to the insured's policy unless such change was also made applicable to all policies providing like benefits and renewal rights and in the same rating class; (2) the rating class of the insured's policy was not changed because of any change in the insured's status, such as change of physical condition or occupation; and (3) each renewal premium was to be determined in accordance with the rating class and age of the insured at the date of issue. Taxpayer computed the premium rates on such guaranteed renewable accident and health policies on the basis that the premium would remain level to age 65, the same as it does for a life insurance policy with a term to age 65. (I-R. 173.)

In determining its gain from operations (also referred to as the Phase II tax base), taxpayer claimed a deduction under Section 809(d)(5) of the 1954 Code, based upon the inclusion of premiums received under the above policies in the computation of 3% of premiums attributable to nonparticipating contracts issued or renewed for periods of 5 years or more. The Commissioner determined that the contracts in question did not qualify under Section 809 (d)(5) as "contracts * * * which are issued or renewed for periods of 5 years or more" and that the premiums attributable to the contracts accordingly were not to be included in computing taxpayer's Section 809(d)(5) deduction. (I-R. 173-179.) The Tax Court (three judges dissenting) held that the deduction should be

allowed. (I-R. 171-181.) The Commissioner thereafter petitioned for review by this Court. (I-R. 183-185.)

SPECIFICATION OF ERROR RELIED UPON

The Tax Court erred in holding that taxpayer's one-year guaranteed renewable health and accident contracts were includable in computing the deduction provided by Section 809(d)(5) of the Internal Revenue Code of 1954 based upon "nonparticipating contracts * * * which are issued or renewed for periods of 5 years or more."

SUMMARY OF ARGUMENT

Taxpayer, a life insurance company, sells a one-year guaranteed renewable health and accident insurance contract. The contract is initially issued for a period of twelve months. The contract is renewable, however, for consecutive periods of twelve months. Taxpayer is free to fix and determine the premium it will charge for any renewal, subject only to the proviso that the renewal premium it charges will apply to all policyholders in the same rating class under the contract. The Tax Court (three judges dissenting) held that such contracts are includable in computing taxpayer's Section 809(d)(5) deduction based on "3 percent of * * * premiums * * * attributable to nonparticipating contracts * * * issued or renewed for a period of 5 years or more." (Emphasis supplied.)

Plainly, the Tax Court erred. Apart from the fact that the contracts here involved do not qualify under a strict, literal interpretation of the terms of Section 809(d)(5), the controlling

of its applicable rate tables in effect on the due date, provided, however, that (1) no change was made in the rate tables applicable to the insured's policy unless such change was also made applicable to all policies providing like benefits and renewal rights and in the same rating class; (2) the rating class of the insured's policy was not changed because of any change in the insured's status, such as change of physical condition or occupation; and (3) each renewal premium was to be determined in accordance with the rating class and age of the insured at the date of issue. Taxpayer computed the premium rates on such guaranteed renewable accident and health policies on the basis that the premium would remain level to age 65, the same as it does for a life insurance policy with a term to age 65. (I-R. 173.)

In determining its gain from operations (also referred to as the Phase II tax base), taxpayer claimed a deduction under Section 809(d)(5) of the 1954 Code, based upon the inclusion of premiums received under the above policies in the computation of 3% of premiums attributable to nonparticipating contracts issued or renewed for periods of 5 years or more. The Commissioner determined that the contracts in question did not qualify under Section 809 (d)(5) as "contracts * * * which are issued or renewed for periods of 5 years or more" and that the premiums attributable to the contracts accordingly were not to be included in computing taxpayer's Section 809(d)(5) deduction. (I-R. 173-179.) The Tax Court (three judges dissenting) held that the deduction should be

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Plainly, the Tax Court erred. Apart from the fact that the contracts here involved do not qualify under a strict, literal interpretation of the terms of Section 809(d)(5), the controlling

fact is that this category of insurance contracts is not what Congress had in mind in enacting this special deduction provision. The legislative history of Section 809(d)(5) makes it abundantly clear that such benefit is restricted to contracts involving the assumption by the company of long-term (defined as five years or more by the statute) unforeseen risks. The purpose of the deduction is to provide an additional cushion for the assumption of such risks. The contracts here do not call for the assumption by the company of any unforeseen, unanticipated risk for more than a one-year period. At that point, through its unilateral right to set renewal premiums, the company is free to increase the premium and thereby shift any unanticipated increased risk which may have developed over the year to the policyholders as a class. The company is never "locked in," in terms of being bound to assume unforeseen risk for a period of five years or more. Accordingly, the contracts here involved do not meet the standard for inclusion in computing the Section 809(d)(5) deduction. No intelligible legislative purpose would be served in differentiating the contracts in dispute from "1-year renewable term" contracts, which the Senate Finance Committee Report expressly stated do not qualify for the benefit sought by this taxpayer.

ARGUMENT

TAXPAYER'S ONE-YEAR GUARANTEED RENEWABLE HEALTH AND ACCIDENT CONTRACTS DO NOT QUALIFY AS "NONPARTICIPATING CONTRACTS * * * WHICH ARE ISSUED OR RENEWED FOR PERIODS OF 5 YEARS OR MORE" AND PREMIUMS ATTRIBUTABLE TO THEM ACCORDINGLY ARE NOT INCLUDABLE IN COMPUTING THE ALTERNATIVE DEDUCTION PROVIDED BY SECTION 809(d)(5) OF THE 1954 CODE

A. The nature and provisions of the insurance contracts involved

There is no dispute as to the provisions of the insurance contracts involved on this review. The contract is characterized as a "Guaranteed Renewable Income Protection Policy." (Ex. 29-AC.) It is available only to persons of 59 years old or less on the issuance date. The policy contract is issued for an initial term limited to 12 months. Thereafter, and prior to the 65th birthday of the insured, the contract may be renewed for consecutive terms, but no term for which it is renewed may be in excess of 12 months. (I-R. 173; Ex. 29-AC.) The pertinent contract provision states (Ex. 29-AC):

> The Insured shall have the right, prior to his 65th birthday, to renew this Policy for consecutive terms each of the same number of months as the Initial Term by payment to the Company of the renewal premium for each such term, which premium shall be due on the first day of each renewal term.

The presence in the contract of the one-year term limitation is illuminated by the next paragraph of the contract (Ex. 29-AC):

> The amount of such renewal premium shall be determined from the Company's applicable table of rates in effect on the due date thereof, and the Company reserves the right to change from time to time the table of rates applicable to premiums thereafter becoming due.

It is apparent that taxpayer, as the insurer, did not wish to bind itself for more than the term of a year to provide insurance coverage for any premium certain. Rather, it preferred to be in a position each year to make a unilateral independent determination as to what it would charge for insurance coverage for that year. As the contract further provides, this independent determination would be made not in respect of an individual insured, but in respect of the holders of the particular policy as a group. 1/ Any long-range, unanticipated risks or costs connected with the block of business represented by the contract would be borne not by taxpayer, but by the insureds as a class (through an increased premium). Taxpayer, at the outset, is bound to the risk for a period of 12 months. After that, however, it is free to adjust or increase the premium.

It is evident, from a practical standpoint, that the unilateral right to fix and increase the annual premium which will be charged gives taxpayer what is essentially the right to force a termination of coverage. If, for its own business reasons, taxpayer found the bloc of business represented by the contract to be unadvantageous, its power to fix the annual premium would be tantamount

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1/ Changes in the annual premium would be made as to all insureds in the same rate class. Thus, an individual policyholder would not be selected out for an increased premium; rather, the increase would be shared and carried by all the insureds under the contract in the same rate class. (I-R. 173; Ex. 29-AC.)

to a power to effect a discontinuance of the business represented by the contract. What is crucial here, however, is a simpler point about which there can be no conjecture. Although the policy contract contains the annual renewal provision, such provision, in the context of taxpayer's right to change the annual premium, imposes upon taxpayer no risk beyond the risk involved in coverage for the term of a single year. Taxpayer is free to shift any increase in the risk beyond that point to the insureds as a class under the contract. Such a contract, as we shall now show, is plainly outside the types of contracts, the premiums attributable to which are to be included in the computation of the special deduction provided by Section 809(d)(5) of the 1954 Code, supra.

B. The special deduction provided by Section 809(d)(5) and the requirement that premiums included be attributable to contracts "issued or renewed for periods of 5 years or more"

The determination of the taxable income of a life insurance company is made under a detailed three-phase statutory formula. Sections 801-820, 1954 Internal Revenue Code (26 U.S.C. 1964 ed., Secs. 801-820). 2/ Phase I is concerned with measuring its

2/ The formula was established under the Life Insurance Company Income Tax Act of 1959, P.L. 86-89, 73 Stat. 112, Section 2, which extensively revised the method of taxing life insurance companies. For a detailed discussion of the 1959 Act, see United States v. Atlas Ins. Co., 381 U.S. 233.

income from investments and allocating such income between a non-taxable policyholders' share deemed necessary for reserves and a taxable company's share. Section 804, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 804). Phase II is directed at ascertaining the company's income from all sources and is referred to as the determination of gain or loss from operations. Section 809, Internal Revenue Code of 1954, supra. Income from all sources, including premium income enters into this latter formula. Gain or loss from operations is arrived at after subtracting certain items for which deductions are provided.[3/] One of these deductions is the Section 809(d)(5) deduction here involved.

Section 809(d)(5) provides a special deduction related to the life insurance company's nonparticipating business. A non-participating insurance contract is one wherein the policyholder has no right to participate in the divisible surplus of the company. Section 1.809-5(a)(5)(ii), Treasury Regulations on Income Tax (1954 Code). Nonparticipating contracts are issued by stock insurance companies, i.e., where company ownership is in stockholders who may or may not happen to be policyholders. In contrast, mutual insurance companies, i.e., those where company ownership is in the policyholders themselves, issue participating contracts entitling the policyholder to

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3/Life insurance company taxable income consists of taxable investment income or gain from operations, whichever is the smaller, plus 50% of the excess, if any, of gain from operations over taxable investment income. To this are added certain amounts relating to distributions to shareholders which are taxed under Phase III which is not here pertinent. Section 802(b), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 802).

share in the profits through dividends. Mutual company policyholders expect periodic dividends, and, in order to provide a regular and continuous flow of dividends, mutual companies traditionally charge a higher annual premium than stock companies, subsequently refunding a portion of the premium to the policyholder as a dividend. S. Rep. No. 291, 86th Cong., 1st Sess., p. 22 (1959-2 Cum. Bull. 770, 786). The 1954 Code (Section 811 (26 U.S.C. 1964 ed., Sec. 811)) provides a deduction for all dividends so paid.

The stock insurance companies argued to Congress that this "redundant premium" device, along with the dividend deduction, would give to mutual companies a built-in tax advantage over stock companies. Mutual companies could maintain tax-free a surplus or cushion from year to year which could be used to meet unforeseen contingencies and unanticipated risks. Stock companies, in order to have available funds equivalent to those supplied mutuals through redundant premiums, would have to maintain a relatively larger surplus which would necessarily have to come out of taxable income. The conclusion was that an extra benefit to stock companies should be written into the law to compensate for the benefit which mutual companies would be receiving. H. Rep. No. 34, 86th Cong., 1st Sess., pp. 6-7, 12, 13 (1959-2 Cum. Bull. 736, 740, 744-745. The result was a provision in

H.R. 4245, 86th Cong., 1st Sess., the House bill, providing a special deduction of an "amount equal to 10 percent of the increase for the taxable year in the reserves for nonparticipating contracts."

This provision constitutes what is now the first of two alternative formulae for the deduction set out in Section 809(d)(5). This formula, however, was not satisfactory to all industry representatives. Hearings before the Senate Finance Committee produced testimony by representatives of some stock companies to the effect that an alternative to the above formula would be necessary to prevent discrimination of sorts against some companies. Senate Hearings, Committee on Finance, 86th Cong., 1st Sess., on H.R. 4245, pp. 129-130, 422-423, 614-615, 686-687. Testimony was given to the effect that the need for the "cushion" or "safety margin" urged for stock companies results from the assumption under some types of policies of long-term risk. Although a formula based upon 10 percent of reserves for nonparticipating contracts would provide a cushion for stock companies issuing policies involving assumption of a long-term risk and maintenance of a high reserve, it would fail to provide a cushion for stock companies principally issuing policies involving long-term risk but low reserves. For instance, some policies involve a substantial savings element and require maintenance of a consequent high reserve. Other types of policies involve smaller savings elements or no savings elements

at all, and, therefore, smaller reserves. Viewed in that light, a formula based simply upon reserves would not adequately relate to the amount of long-term risk actually assumed by companies which principally issue insurance contracts involving assumptions of long-term risks but maintenance of comparatively low reserves. Accordingly, a statutory alternative based upon premiums on nonparticipating contracts "as to which the company cannot elect to get off the risk" for a duration of five years or more was recommended. Senate Hearings, Committee on Finance, 86th Cong., 1st Sess., on H.R. 4245, pp. 614-615. See also pp. 129-130, 422-423, 686-687. As enacted, Section 809(d)(5) provided an alternative deduction in--

> an amount equal to 3 percent of the premiums for the taxable year (excluding that portion of premiums which is allocable to annuity features) attributable to nonparticipating contracts * * * which are issued for periods of 5 years or more. * * *

The deduction is explained in the Senate Report (S. Rep. No. 291, 86th Cong., 1st Sess., pp. 54-55 (1959-2 Cum. Bull. 770, 810)) in the following manner:

> 5. Deduction for nonparticipating policies.-- Policyholder dividends in part reflect the fact that mutual insurance is usually written on a higher initial premium basis than nonparticipating insurance, and thus the premiums returned as policyholder dividends, in part, can be viewed as a return of redundant premium charges. However, such amounts provide a "cushion" for mutual insurance companies which can be used to meet various contingencies. To have funds equivalent to a mutual company's redundant premiums, stock companies must maintain relatively larger surplus and capital accounts, and in their case the surplus generally must

> be provided out of taxable income. To compensate for this, the House bill allows a deduction for nonparticipating insurance equal to 10 percent of the increase in life insurance reserves attributable to nonparticipating life insurance (not including annuities). Your committee has recognized the validity of the reasons for providing such a deduction and has therefore continued it in your committee's version of the bill. However, basing this addition, as does the House bill, only upon additions to life insurance reserves does not take account of the mortality risk factor present in policies involving only small reserves. To overcome this deficiency your committee's amendments provide that a special 3 percent deduction based on premiums is to apply, instead of the 10 percent deduction, where it results in a larger deduction. This is a deduction equal to 3 percent of the premiums for the current year attributable to nonparticipating policies (other than group or annuity contracts) issued or renewed for a period of 5 years or more.

In delineating, for purposes of the deduction, those contracts which qualify as involving long-term risk, Congress set a requirement that a contract, in order to qualify, must preclude the company from getting off any increased risk for at least five years. The Senate, in discussing the minimum five-year requirement, stated (S. Rep. No. 291, 86th Cong., 1st Sess., p. 55 (1959-2 Cum. Bull. 770, 810)):

> The determination of whether a contract meets the 5-year requirement will be made as of the date it was issued, or as of the date it was renewed, whichever is applicable. Thus, a 20-year nonparticipating endowment policy will qualify under section 809(d)(5), even though the individual insured subsequently dies at the end of the second year, since the policy was issued for a period of 5 years or more. <u>However, a 1-year renewable term contract will not qualify, in that as of the date it was issued (or of any renewal date) it was not issued (or renewed) for a period of 5 years or more</u>. In like manner, a policy originally issued for a 3-year period and subsequently renewed

> for an additional 3-year period will not qualify. However, if this policy were renewed for a period of 5 years or more, the policy would qualify under section 809(d)(5) from the date it was renewed. * * * (Emphasis supplied.)

See also Section 1.809-5(a)(5)(iv), Treasury Regulations on Income Tax (1954 Code), supra.

The Senate Report is explicit in stating that a one-year renewable term contract does not qualify for the deduction. A company issuing or renewing such a contract does not undertake, for the requisite five-year duration, any risk of unforeseen contingencies beyond those contemplated in arriving at the premium. The extent of its risk in this respect is no more than one year. After that, and coincident with any renewal, the company is free to increase the class premium, thereby shifting all costs of unforeseen risks to the insureds. The Senate Report, on the other hand, states that a twenty-year nonparticipating endowment policy would qualify for the deduction. This is so because the company under such a policy, binds itself to assume risks incident to unforeseen contingencies for a duration in excess of five years. The company there binds itself to provide the insurance for twenty years at a specified premium which cannot be increased. (See Ex. 30-AD.) When (and if) unforeseen events occur over the course of the long terms covered by the policies, i.e., changes in environmental conditions increasing the death rate of the insureds, it is the company which will have to bear the burden of the increased unanticipated risks. Whereas

the company under such policies must absorb any such increased risk, the company under a one-year renewable term policy effectively can pass the burden to the policyholders.

C. Taxpayer's contracts do not bind it to assume unanticipated risks for a period of five years or more and do not qualify for the deduction

The contracts here are simple one-year guaranteed renewable health and accident contracts. Their inclusion in the computation of the deduction sought is precluded not only under the language of the Senate Report, supra, but under its avowed rationale. The Senate Report, supra, states that the "determination of whether the contract meets the 5-year requirement will be made as of the date it was issued, or as of the date it was renewed whichever is applicable." (P. 55, 1959-2 Cum. Bull., p. 810.) The contracts here are issued for initial term, not of five years or more, but for what is specifically stated to be a twelve-month period. Coincident with a provision entitling the company to set and determine any renewal premium, the insureds are given the right to renew. The contracts, however, are not "renewed for a period of 5 years or more" as of the date of renewal, and this is the date for the five-year determination. Rather, they are renewed as of that date for a twelve-month period. The contracts here thus do not meet the five-year test for qualification.

Moreover, the Senate Report, supra, states specifically that a "1-year renewable term contract" will not qualify for the deduction. (P. 55, 1959-2 Cum. Bull., p. 810.) The fact that such a contract is a one-year

renewable contract cannot serve to distinguish it out from this classification. One-year renewable contracts, whether guaranteed renewable or not, involve the same infirmity from the standpoint of qualification for the deduction. In neither instance is the company required to absorb all risks (whether anticipated or not) for at least a five-year period. Rather, at the outset, all risks need be absorbed only over a one-year period. If conditions during that year indicate that the risk is greater than anticipated, the company is bound only to the end of the year. Then it merely sets a new premium and passes the cost of that risk to the policyholders as a whole. The fact that the company, in the case of a guaranteed renewable contract, as opposed to one not guaranteed renewable, cannot refuse annual renewal is of no moment. In the first place, it must be recognized that the right to determine and set each annual premium for the policyholders as a class without restriction is tantamount to a right to decide unilaterally whether to continue or discontinue the block of business represented by the contracts. More importantly, it is not the right to discontinue the contracts after one year, but the right to get off unanticipated risk after one year, which precludes the contracts from qualification for the deduction. It is this unanticipated risk over a long term (here set by Congress as a period of five years or more) to which the deduction is directed. Here the company is not bound to that risk for more than a year and has a built-in device, i.e., the unilateral right to determine and raise any renewal premium, which

totally and effectively shifts any increased risk beyond a one-year period to the policyholders as a class.

The Tax Court majority opinion (three judges dissenting) found for taxpayer. (I-R. 176-179.) Its brief discussion of this issue does not offer a tenable basis for a holding in taxpayer's favor. Rather, serious confusion in respect of the purpose of the deduction and the requisite five-year requirement is evident.

The majority states that the contracts "imposed substantial limitations on * * * premium changes." (I-R. 178.) This observation is confusing. The only limitations imposed on premium changes are directed toward assuring that any change in renewal premium will not be directed at individual policyholders, regardless of changes in their health, but must be made across the board for all policyholders in the rating class. The effect of these limitations is only to provide for the spreading of the total cost of any increased unanticipated risk among the policyholders as a class. Such limitations, however, in no way change the essential fact that taxpayer does not have to bear the unanticipated risk. Under the contracts, it is able to shift it to the policyholders and, whether shifted to some policyholders or all policyholders, long-term unanticipated risk is nevertheless not borne by taxpayer.

The majority then states that if the contracts in question do not qualify in computing the deduction, "we would be required to hold the same way as to all nonparticipating insurance contracts, even though the policy was issued for 5 years or more." (I-R. 179.) We are at a loss to understand this conclusion. As the legislative history of the formula for the deduction in issue indicates, its purpose was to provide a cushion to companies issuing long-term contracts involving the risk of unanticipated losses. The fact that the insurer would be bound for a long period to absorb unforeseen losses not considered in setting the premium was deemed to justify this additional deduction. The deduction, as the Senate Report, supra, indicates, is available in respect of all nonparticipating policies, excepting some with annuity features (not here relevant) where the company obligates itself to furnish coverage at a guaranteed rate for periods of five years or more. In such circumstances, the company is, in effect, "locked in." If there are unforeseen losses, the company will be bound to absorb them at least for periods of five years or more. These types of contracts include the great amount of regular life insurance contracts. Under such contracts (see Ex. 30-AD) the company is required to furnish coverage for a long period of time at a premium which is set and specified in that contract. The company cannot change or renegotiate that premium every year, but is bound by it. Such contracts which are for periods of five years or more qualify for purposes of the deduction. The company, under the contracts here in question, is able to get off

any unforeseen risk after any given twelve months. The contracts here do not meet the five-year requirement. A holding to that effect conceivably cannot require a similar holding as to the great number of contracts, discussed above, which do meet the requirement.

The statements in the majority opinion, discussed above, are indicative of the assumptions which led it into error. At the heart of the error is a failure to recognize that the five-year requirement is not satisfied by any contract merely because it conceivably could be extended over a five-year period. Any one-year renewable term policy conceivably could be so extended, and Congress has specifically stated that such a contract would not qualify for the deduction. Senate Report, supra. The five-year requirement, as the legislative history makes clear, and as we have shown, refers to a period of five years or more wherein the company is going to be forced to absorb all additional costs of unforeseen risks or losses. The contracts here do not satisfy that requirement.[4/] The Tax Court majority erred in allowing the deduction.

Taxpayer made one additional assertion below, not commented upon in either the majority or the dissenting opinion, which requires brief mention here, if only because it is anticipated that taxpayer may raise it again. Section 801 of the 1954 Code is devoted to defining life insurance reserves for purposes of reserve computations

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4/ Rev. Rul. 65-237, 1965-2 Cum. Bull. 231, discussing one-year guaranteed renewable health and accident contracts and the five-year requirement, also holds to this effect.

to be made throughout the insurance sections (Sections 801 through 820, 1954 Code). Section 801(a)(2) provides that reserves for noncancellable life, accident and health policies are to be included in life insurance reserves for purposes of reserve computations. Section 801(e) provides that:

> SEC. 801. DEFINITION OF LIFE INSURANCE COMPANY.
>
> * * *
>
> (e) Guaranteed Renewable Contracts.--For purposes of this part, guaranteed renewable life, health, and accident insurance shall be treated in the same manner as noncancellable life, health, and accident insurance.
>
> * * *
>
> (26 U.S.C. 1964 ed., Sec. 801.)

The alternative formula under Section 809(d)(5) with which we are concerned is not based upon reserves, but upon "an amount equal to 3 percent of * * * premiums * * *." Indeed, as we have shown, the companies which urged the enactment of the alternative formula did so on the ground that the primary formula "10 percent of the increase * * * in the reserves" would not be a satisfactory basis for a formula for all stock companies. Accordingly, the alternative formula has nothing to do with life insurance reserves. Taxpayer nevertheless argued below that the presence of Section 801(e) in the Code requires that its one-year guaranteed renewable health and accident contracts be treated, for purposes of the alternative formula under Section 809 (d)(5), as if they were noncancellable, i.e., as if taxpayer were not entitled to change the premium charged for any annual renewal. Such an assertion would make no sense from the standpoint of the statute, and such an interpretation of the Code would serve no intelligible legislative purpose.

Life insurance reserves are amounts estimated on the basis of experience and actuarial tables which are set aside, and which, with interest thereon, are anticipated to be sufficient to pay off future policy claims. Section 801(d), 1954 Code. Reserves essentially represent provision for what is expected to happen if the insurance coverage does in fact continue. Among the assumptions upon which reserves are based is the expectation that, as the insured grows older, the risk will gradually increase and provision must be made for this. In computing the annual premium which it will charge for a given contract, the insurance company takes these factors into account and figures in the amount necessary to provide an appropriate reserve. If everything goes as expected, the reserves will provide sufficient funds to pay off claims in future years. Because noncancellable health and accident insurance contracts and guaranteed renewable health and accident contracts involve the possibility of long-term coverage and increased mortality risk, reserves for these types of contracts to anticipate such risk are set up. They are akin to those reserves under ordinary life policies in that they are established in basically the same manner and deal with anticipated risk and provision therefor. They are thus treated in the same manner for reserve computation purposes throughout the Code. The fact that reserves so established are all properly treated in one manner for tax purposes does not make a policy which is only guaranteed renewable into a non-cancellable contract for purposes of the alternative formula for

the Section 809(d)(5) deduction, which formula has nothing to do with reserves.[5/] Section 801(e) applies only to reserves for guaranteed renewable contracts and their use in the computation of life insurance reserves in the various phases of the life insurance company tax. It is not to be used to change somehow the characteristics of a guaranteed renewable contract to make it something it is not so as to qualify for a deduction which its actual characteristics preclude.

CONCLUSION

That portion of the decision attributable to the holding of the Tax Court that taxpayer's guaranteed renewable health and accident contracts are contracts "issued or renewed for periods of 5 years or more," for purposes of Section 809(d)(5) of the 1954 Code, should be reversed

Respectfully submitted,

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JUNE, 1968.

5/ Not only is the alternative formula for Section 809(d)(5) not based upon any reserve calculation, but the purpose of the deduction provided by that formula is to deal with unanticipated risk, rather than anticipated risk, which is provided for by reserves.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated:_____ day of _____, 1968.

_____
Attorney

GPO 926-100

No. 22583

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES E. MINTON,

Appellant,

v.

WILBUR J. COHEN, Secretary of
Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

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I N D E X

C I T A T I O N S

Cases:

IN THE UNITED STATES COURT OF APPEALS
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No. 22583

CHARLES E. MINTON,

Appellant,

v.

WILBUR J. COHEN, Secretary of
Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

This action was instituted by the appellant ("claimant") in the district court on November 9, 1966, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review the final decision of the Secretary of Health, Education and Welfare denying him a period of disability and disability insurance benefits (R. 1-2). [1/] The district court granted the Secretary's

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1/ Since this action was first instituted, Secretary Gardner has left office. Wilbur J. Cohen, the new Secretary, is therefore

motion for summary judgment on the ground that the administrative decision was supported by substantial evidence (R. 53-55).

This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Administrative Proceedings

Claimant, Charles E. Minton, first filed an application for a period of disability and disability benefits pursuant to Sections 216(i) and 223 of the Social Security Act, 42 U.S.C. 416(i) and 423, on January 20, 1961 (Tr. 267-270). [2/] In that application he stated that he was born in 1913 and he alleged disability from 1958, at age 45, because of "Complications from Broken Back". That application was denied initially on June 24, 1961 (Tr. 271) and on reconsideration on September 20, 1961 (Tr. 273). While claimant was advised of his right to request a hearing on his claim within six months of the denial of his claim on reconsideration (Tr. 274), his request for a hearing was made on September 7, 1962 (Tr. 47) and was therefore dismissed (Tr. 44).

On September 7, 1962, claimant filed a second application for Social Security benefits (Tr. 275). He again alleged disabili from 1958, asserting that his impairments were back trouble and

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2/ The reference "Tr." is to the administrative transcript which has been filed as part of the record on appeal.

lipped disc in neck. That application was denied initially on arch 28, 1963 (Tr. 279), and on reconsideration on May 15, 1963 Tr. 282). On May 21, 1963, claimant requested a hearing (Tr. 43), hich was held before a hearing examiner on September 10, 1963 Tr. 48-136). The hearing examiner denied claimant relief under is 1962 application [3] and declined to reopen his 1961 applica-ion because the new medical evidence did not justify a finding f "good cause" for reopening (Tr. 369). The Appeals Council ranted claimant's request for review and remanded the matter o a hearing examiner for a further hearing on both applications or benefits (Tr. 373-374). [4]

A second hearing was held on October 30, 1964, before a ifferent hearing examiner (Tr. 137-262). On April 30, 1965, he hearing examiner issued his decision in which he determined hat claimant was not disabled within the meaning of the Act uring the period of his insured status which expired on March 31, 961 (Tr. 17-32). The Appeals Council granted claimant's request or review. After obtaining further evidence, and after considering

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/ The denial of relief under the 1962 application was based n a determination that claimant's insured status expired prior o the last month for which the application was effective. The enial did not relate the merits of the claim.

/ With respect to the 1962 application the Appeals Council eversed the hearing examiner's determination as to the date of he expiration of claimant's insured status and also ordered onsideration of the 1961 application.

the effect of the 1965 amendments to the Act on claimant's application (Tr. 5-10), [5/] the Appeals Council supplemented the hearing examiner's decision and affirmed it (Tr. 9-10).

Medical Evidence

The medical evidence in this case relates primarily to claimant's back impairments. Claimant first injured his back in 1956 when he tripped and fell at work (Tr. 94). He re-injured his back in 1958 when he was putting timber on a scaffold (Tr. 20

On July 17, 1959 and on October 6, 1959, claimant was examin by a group of doctors in behalf of the Claims Department of the Industrial Commission of Arizona. The report of July 17, 1959 (Tr. 317-319) indicated that claimant walked without much difficulty, and that he could extend both legs, arching his back without much discomfort. There was slight atrophy of the left leg. The report states "He has some subjective complaints during all maneuvers of the sciatic stretch tests today. There i other objective finding of disability." The report concludes by stating that claimant should be seen again for final evaluatio but "[i]n the meantime, it would be our opinion that this man should be released for light work as of the present time."

5/ The 1965 amendments changed the requirement that an impairme to be disabling, had to be "of long continued and indefinite duration", and substituted instead the requirement that the impairment "has lasted or can be expected to last for a continuou period of not less than 12 months . . .". P. L. 89-97, Section 303(a)(1), 79 Stat. at 366.

The report of the group consultation of October 5, 1959 (Tr. 323-334) summarizes previous examinations and reports. Those reports set forth the view that claimant's subjective complaints were not substantiated by any organic findings (5-8-59, Tr. 325), and that there was no evidence of intraspinal pathology (5-19-59, Tr. 325). Earlier a diagnosis of acute tenderness of the lumbosacral spine had been made (12-16-58, Tr. 323).

With respect to the examination of October 5, 1959, the doctors reported that claimant walked haltingly, dragging his left leg. The limp disappeared, however, later in the examination (Tr. 331). Claimant's forward bending was carried out reasonably well, but backward bending was slightly limited by lumbosacral pain. Claimant climbed onto the table easily and appeared to lie comfortably in the supine position. The doctors reported an area of acute tenderness well localized, at the lumbosacral region. The psychiatric examination revealed no gross disorder of thinking. Claimant was "in good contact with the situation" (Tr. 333). The report concludes by noting that a myelogram was negative, that claimant had no psychiatric disability attributable to his accident, and that claimant had a 10% general physical disability as a result of his back injuries.

On April 17, 1962, claimant was seen again in group consultation and the consultants found no evidence of new and additional disability to justify reopening claimant's case (Tr. 351-353). 6/

6/ The Industrial Commission of the State of Arizona, on July 27, 1962, found that claimant had a 10% general functional disability

The report of Dr. Sitler (Tr. 344-346), dated May 23, 1961, states that claimant has two ruptured discs, [7] and is "permanently and totally disabled" unless he should undergo surgery. Dr. Sitler indicated that claimant might be able to work if he could be trained in bench work. Despite this report, Dr. Sitler apparently concurred in the group consultation of April 17 1962, finding no new disability (Tr. 353).

Other medical reports indicate, inter alia, that claimant has a degenerated disc and should be considered for rehabilitatic for sedentary work (Tr. 346), and that claimant suffers from torticollis [8] chronic, mild (Tr. 339).

In 1966, Dr. Hoffman reported and his report was before the Appeals Council (Tr. 388-392). Dr. Hoffman believed that claimant had multiple problems and he would not rule out a

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7/ In accord with this diagnosis is the earlier report of Dr. Callopy, dated August 20, 1957 (Tr. 382).

8/ Torticollis is "a contracted state of the cervical muscles, producing twisting of the neck and an unnatural position of the head." Dorland's Illustrated Medical Dictionary, 23rd Ed., p. 89
Claimant suffered a neck injury in 1945 while in service (Tr. 194) and receives VA compensation for the disabilities resulting therefrom (Tr. 19). As late as April 6, 1966 it appeared that a slipped disc in the neck was not likely but that arthritic changes most likely accounted for claimant's neck problem (Tr. 392).

mbar disc. He also suspected a chronic brain syndrome. X-rays viewed by Dr. Hoffman (Tr. 394) indicated osteoarthritic changes the spine, a tilt of the cervical spine, but no definite idences of fracture. There was an increase in angulation of e lumbosacral angle. Dr. Hoffman also believed there was a tary type of scoliosis (curvature) and some narrowing of the sc spaces. In concluding his discussion of the X-rays Dr. Hoffman id: "It must once again be emphasized that this patient is ry unreliable, due to background and education, and that only jective evidences will be of any service" (Tr. 394).

Vocational Evidence

Claimant left school at the age of 10 to work in his father's op which handled carpentry, blacksmithing, and welding. At ifteen, claimant took over the shop (Tr. 162). Before his ntry into service in 1945 claimant engaged in carpentry, ground evelling, sewing potato sacks, and various other kinds of work Tr. 166-177). In the Army, claimant taught tool sharpening nd tool dressing, and supervised use of construction equipment Tr. 189-193). After completion of his military service claimant orked primarily in carpentry until he stopped working in 1958 Tr. 196).

While claimant's formal education is only through the ourth grade, he is able to do arithmetic, read blueprints Tr. 72), and has had supervisory responsibility both in and ut of service (Tr. 74, 189-193, 166).

A vocational expert testified at the hearing that, based on the medical evidence and claimant's work experience, he concluded that claimant could be a timekeeper, time checker, telephone order clerk, and dispatcher (Tr. 230). Those jobs existed in the economy of the United States, the State of Arizona, and the Phoenix area (Tr. 231). After listening to claimant, the expert believed he could also be a consultant in a lumber yard store and an estimator (Tr. 233). These jobs he stated existed in the economy of the United States and Arizona (Tr. 233). The expert also testified that claimant could repair violins (Tr. 241 and claimant testified he had experience with violins (Tr. 251-252).

Claimant for his part asserts that he is in constant pain and "can't hold up for more than a little while" (Tr. 245).

Administrative Decisions

The hearing examiner concluded that claimant was not disable at any time during his period of insurance, which expired March 3 1961 (Tr. 17-32). The hearing examiner reviewed all of the medica evidence before him and determined that the objective medical findings, i.e., orthopedic and neurological testing, failed to show any "significantly severe underlying pathological condition" (Tr. 29). In view of claimant's ability and occupational attainments the hearing examiner concluded that he had skills readily transferable to light work. Thus, the hearing examiner ruled that claimant was not disabled under the Act.

The Appeals Council, after taking further evidence, upplemented the hearing examiner's decision and found specifically hat claimant could have engaged in the light jobs suggested y the vocational expert, viz. timekeeper, time checker, telephone rder clerk, dispatcher, and various bench-type jobs including nstrument repair.[9/] The Appeals Council further found that laimant suffered from no psychiatric impairment sufficient to e disabling on or before March 31, 1961. Finally, the Appeals ouncil determined that claimant was not eligible for benefits nder the 1965 amendments to the Social Security Act (Tr. 5-10).

As thus supplemented, the hearing examiner's decision was ffirmed. The Appeals Council's decision was rendered on eptember 9, 1966 and was the final decision of the Secretary. 0 C.F.R. 404.951.

District Court Proceedings

Claimant filed suit in the district court on November 9, 966, to review the Secretary's denial of benefits.[10/]

/ The Appeals Council acknowledged that claimant has some ower neck and back impairments from degenerative osteoarthritic hanges of a mild degree. But the Appeals Council did not elieve that claimant's neck and back impairments precluded him rom engaging in light work as of March 31, 1961.

0/ Under 42 U.S.C. 405(g) claimant was required to file his uit within 60 days of the Secretary's decision, and his suit iled on November 9, 1966 was untimely. Initially the Secretary oved to dismiss for lack of jurisdiction (R. 6), but subse- uently the Appeals Council extended the time within which suit ould be filed to November 9, 1966, the date suit was filed (Tr. 2). he action thereupon proceeded on the merits.

By order dated October 23, 1967, the district court granted the Secretary's motion for summary judgment, concluding that his decision was supported by substantial evidence (R. 53). Judgment was accordingly entered for the Secretary on October 26, 1967 (R. 54). This appeal followed (R. 59).

STATUTES INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. 401 et seq., are reproduced in the appendix, infra, pp. 1a-3a.

SUMMARY OF ARGUMENT

The question presented for review in a Social Security Act case is whether the Secretary's determination is supported by substantial evidence. The findings of the Secretary, including the inferences drawn therefrom and the resolution of evidentiary conflicts, must be affirmed if supported by the evidence.

The legal standards to be applied in disability determination have been clarified by the Social Security Amendments of 1967, P. L. 90-248. Those amendments direct that a finding of disabilit must be based on objective medical evidence. They also direct that in determining that a claimant is unable to engage in any substantial gainful activity, it need be shown not only that he is unable to resume his former work, but also that he is unable to do any other kind of substantial work which exists in the national economy. There is no requirement that such substantial work be available in claimant's local community, nor need there be a showing that claimant would actually be hired for such work.

Under the requirements of the disability provisions of the ocial Security Act, it is clear that the Secretary's determination that claimant was not disabled is supported by substantial vidence. The Secretary properly found from the objective edical evidence that claimant had residual physical capacity o engage in light work. There is ample evidentiary support or the finding that claimant could perform the light jobs isted by the vocational expert, which jobs exist in the national conomy and in the state of Arizona.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE SECRETARY'S DETERMINATION THAT CLAIMANT WAS NOT DISABLED WITHIN THE MEANING OF THE SOCIAL SECURITY ACT.

1. The Standard of Review.

Pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), the "findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive" [11/]. Thus this Court has noted that the question presented for review in these cases is a "narrow one", Mark v. Celebrezze, 348 F. 2d 289, 292 (C.A. 9), and the Secretary's findings of fact, including the inferences and conclusions drawn therefrom, must be sustained if supported by substantial evidence. United States v. LaLone, 152 F. 2d 43, 44 (C.A. 9); Mark v. Celebrezze, supra, 348 F. 2d

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11/ Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229.

at 293; McMullen v. Celebrezze, 335 F. 2d 811, 814 (C.A. 9), certiorari denied, 382 U.S. 854. And this Court has recognized that under the substantial evidence test resolution of conflicts in the evidence is for the Secretary. Galli v. Celebrezze, 339 F. 2d 924, 925 (C.A. 9).

2. The Standard of Disability.

Under the disability provisions of the Social Security Act, the claimant was obliged to show that on or before March 31, 1961 (the date of the expiration of his insured status under the Act) that he was unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months". (Emphasis added.) 42 U.S.C. (Supp. I) 423(c)(2), 416(i)(1).

In the Social Security Amendments of 1967, P. L. 90-248, 81 Stat. 921, Congress amended the definition of disability so as to make it very clear what kinds of physical or mental impairments satisfy the statute. Thus Section 158(b) [12/] of the Amendments provides, inter alia:

12/ The amendments contained in Section 158 of P. L. 90-248 apply to cases pending in court where "the decision in such civil action has not become final" before January of 1968. Section 158(c), 81 Stat. at 869. Thus these amendments apply to this case which is still pending in this Court. Dean v. Gardner, C.A. 9, No. 21,483, decided March 29, 1968, slip op. p. 3.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

As this Court has already noted, "[t]he requirement in the amendment that the impairment be 'demonstrable by medically acceptable clinical and laboratory diagnostic techniques' serves to emphasize the need for objective medical evidence of disability." (Emphasis added.) Ryan v. Secretary of Health, Education and Welfare, C.A. 9, No. 21,672, decided April 9, 1968, slip op. p. 3, fn. 1. See also Steimer v. Gardner, C.A. 9, No. 21,550, decided May 14, 1968, slip op. p. 2. 13/

13/ This Court's interpretation is fully supported not only by the language of the statute but also by its legislative history. Thus the Report of the House Ways and Means Committee (H. Rept. No. 544, 90th Cong., 1st Sess.) states (p. 30):

* * * * *

The impairment which is the basis for the disability must result from anatomical, physiological, or psychological abnormalities which can be shown to exist through the use of medically acceptable clinical and laboratory diagnostic techniques. Statements of the applicant or conclusions by others with respect to the nature or extent of impairment or disability do not establish the existence of disability for purposes of social security benefits based on disability unless they are supported by clinical or laboratory findings or other medically acceptable evidence confirming such statements or conclusions.

* * * * *

It is clear, therefore, that claimant must have an impairment or impairments which are demonstrable by objective medical evidence and which are of a level of severity such as would preclude him from engaging in any substantial gainful activity. With respect to the requirement that claimant must be unable to engage in "any substantial gainful activity", the 1967 amendments added the following provision:

> (2) For purposes of paragraph (1)(A) --
>
> (A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 202(e) or (f)) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

The purpose of this provision was to make it clear that "[I]t is, and has been the intent of the statute to provide a definition of disability which can be applied with uniformity and consistency throughout the Nation, without regard to where a particular individual may reside, to local hiring practices or employer

preferences, or to the state of the local or national economy." H. Rept. No. 544, supra, at p. 30. [14]

Under the amended definition of disability, therefore, a person is not to be found disabled if (1) he can resume his former work or (2) if he can engage in any other kind of substantial gainful "work which exists in the national economy." [15] And the Secretary need not be concerned with whether in fact

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14/ The House Report also makes it clear that Social Security disability protection is more limited than other forms of insurance. The report states: "While such factors as whether the work he could do exists in his local area, or whether there are job openings, or whether he would or would not actually be hired may be pertinent in relation to other forms of protection, they may not be used as a basis for finding an individual to be disabled under this definition." H. Rept. 544, supra, at p. 30.

15/ The bill as it passed the House did not define the phrase "work which exists in the national economy", although the House Report made it clear that it was "not intended, . . . that a job which exists only in very limited numbers or in relatively few geographic locations would be considered as existing in the national economy." H. Rep't. No. 544, supra, p. 30. During the Senate debate, the amended definition of disability was deleted. 113 Cong. Rec., Nov. 17, 1967, S. 16, 746. In reinstating the amended definition, the Conference Committee added the phrase "For the purposes of the preceding sentence (with respect to any individual) work which exists in the national economy means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

The Conference Report (H. Rept. No. 1030, 90th Cong., 1st Sess., at p. 52 explains the new language as follows:

(Continued)

claimant would be hired for a particular job, but only whether the evidence supports a finding that claimant can perform the work.

3. The Secretary's Decision Is Supported By Substantial Evidence.

With the foregoing legal principles in mind, it is clear that the Secretary's determination that claimant was not disabled on or before March 31, 1961, has abundant support in the administrative record and must therefore be affirmed. The medical reports prepared for the Arizona Industrial Commission, Tr. 317, 323, 351, indicate no objective physical pathology to support claimant's subjective complaints of severe pain. And while Dr. Sitler at one time stated that he believed claimant had "two ruptured discs", and was "permanently and totally disabled" (Tr. 344-346), the same doctor was part of a group that examined claimant on April 17, 1962 (Tr. 353), and could find no new evidence to overturn the earlier finding that claimant suffered

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15/ (continued)

* * * * *

> The conference agreement contains substantially the provision of the House bill, but includes language designed to clarify the meaning of the phrase "work which exists in the national economy". This language puts into the statute the same meaning of the phrase that was expressed in the reports of both committees. Under the added language, "work which exists in the national economy" means work that exists in significant numbers in the region in which the individual lives or in several regions in the country. The purpose of so defining the phrase is to preclude from the disability determination consideration of a type or types of jobs that exist only in very limited number or in relatively few geographic locations in order to assure that an

rom a 10% general physical disability from his back impairments nd that claimant's myelogram was negative (See Tr. 334). And r. Sitler himself thought claimant might be able to work if he ould be trained in bench work.

In any event the Secretary was entitled to rely on the eports of the doctors who examined claimant for the Industrial ommission of Arizona and to determine that such medical evidence ogether with the other medical reports did not support a inding that the claimant was unable to engage in any substantial ainful activity. And as we noted above, the Secretary is equired under the Act to determine the existence of impairments n the basis of objective medical evidence. Where, as here, he medical evidence does not support claimant's repeated ssertions of disabling pain, the Secretary correctly resolved hat issue in favor of the heavy weight of the medical evidence.

Nor did the Secretary err in determining that claimant did ot have a disabling psychological impairment on or before arch 31, 1961. A psychiatric examination held on October 1959 howed that claimant "revealed no gross disorder of thinking", nd the claimant was "in good contact with the situation" (Tr. 333). n view of that report in 1959, the Secretary was not required o find a mental impairment in existence in 1961 because of a uggestion that claimant may have had, in 1966, chronic brain yndrome (Tr. 392). Rather the Secretary was clearly permitted o rely on the 1959 medical finding, which was closer in time to the period of claimant's insured status.

It is clear, therefore, that substantial evidence supports the Secretary's determination that claimant retained the residual mental and physical capacity to engage in light work.

Furthermore, the Secretary's determination that claimant could be a timekeeper, time checker, telephone order clerk, and dispatcher, and that he could engage in various bench-type jobs including instrument repair, etc. (Tr. 9) is fully supported by the testimony of the vocational expert, Dr. Daane (Tr. 227-242). The expert not only testified that these jobs could be performed by claimant, but that they (except perhaps for instrument-repair work) exist in the general economy, in the economy of the State of Arizona, and even near Phoenix (Tr. 231, 233). Moreover, in view of claimant's skill and ability as evidenced by his work history and testimony, the vocational expert and the Secretary were clearly entitled to conclude that claimant was equipped by experience and skill to handle these other light jobs. The Secretary was not, of course, obliged to determine whether claimant would be hired for those jobs or whether there were vacancies, or whether the jobs were available in his local community. Under the Act, as amended, the Secretary has to determine only whether claimant could perform any substantial work "which exists in the national economy". The Secretary's

etermination fully meets that standard, and is supported by
16/
oundant and substantial evidence.

CONCLUSION

For the foregoing reasons the judgment of the district
ourt should be affirmed.

Respectfully submitted,

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UNE 1968.

5/ As this Court noted in Dean v. Gardner, supra, slip op. 3, the 1967 amendments add a new provision which may change he burden of coming forward with vocational evidence. Section 58 provides, inter alia:

> (b)(5) **An individual shall not be considered to** be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require. (Emphasis added.)

n view of the ample vocational evidence adduced by the hearing xaminer, it is again unnecessary for the Court to reach the uestion of whether in fact the Secretary is required to make ny vocational showing.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William Kanter

WILLIAM KANTER
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Department of Justice
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AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

WILLIAM KANTER, being duly sworn, deposes and says:

That on June 5th, 1968, he caused three copies of the foregoing brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:

James P. Cunningham, Esquire
19 Luhrs Arcade
Phoenix, Arizona 85003

William Kanter

WILLIAM KANTER
Attorney
Department of Justice
Washington, D.C. 20530

Subscribed and sworn to before me
this 5th day of June, 1968.

Audrey Ann Crump
NOTARY PUBLIC

My Commission expires August 31, 1971.

A P P E N D I X

APPENDIX

42 U.S.C. (Supp. I) 416(i) provides in pertinent part:

(i) Disability; period of disability.

(1) Except for purposes of sections 402(d), 423 and 425 of this title, the term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months, * * *

* * *

42 U.S.C. (Supp. I) 423 provides in pertinent part:

* * *

(c) Definitions.

For purposes of this section --

* * *

(2) The term "disability" means --

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

* * *

Section 158 of the Social Security Amendments of 67, P. L. 90-248, 81 Stat. 821, 867-869, provides in pertinent rt:

* * *

(b) Section 223 of such Act is further amended by adding at the end thereof the following new subsection:

"Definition of Disability"

* * *

(d)(1) The term "disability" means --

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

* * *

(2) For purposes of paragraph (1)(A) --

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 202 (e) or (f) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

* * *

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

* * *

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

* * *

(d) Section 216(i)(1) of such Act is amended by striking out the third sentence and inserting in lieu thereof the following: "The provisions of paragraphs (2)(A), (3), (4), and (5) of section 223(d) shall be applied for purposes of determining whether an individual is under a disability within the meaning of the first sentence of this paragraph in the same manner as they are applied for purposes of paragraph (1) of such section.

(e) The amendments made by this section shall be effective with respect to applications for disability insurance benefits under section 223 of the Social Security Act, and for disability determinations under section 216(i) of such Act, filed --

(1) in or after the month in which this Act is enacted, or

(2) before the month in which this Act is enacted if the applicant has not died before such month and if --

(A) notice of the final decision of the Secretary of Health, Education, and Welfare has not been given to the applicant before such month; or

(B) the notice referred to in subparagraph (A) has been so given before such month but a civil action with respect to such final decision is commenced under section 205(g) of the Social Security Act (whether before, in, or after such month) and the decision in such civil action has not become final before such month.

NO. [redacted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD G. SANCHEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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NO. 20950

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD G. SANCHEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD G. SANCHEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL FACTS

Edward Sanchez appeals from his conviction on Counts 1 and 2 of a three-count indictment charging him with violations of Title 21, United States Code, Section 174 (sale and concealment of narcotics). Co-defendant Carlos Garcia's conviction on Count 3 of the same indictment was affirmed by this Court in 1968.

Count One charges appellant with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of 1.880 grams of heroin, a narcotic drug, which he knew previously had been imported into the United States of America contrary to law. Count Two charges appellant with knowingly and

unlawfully selling and facilitating the same heroin [C. T. 2]. 1/

The indictment was filed on January 28, 1966 [C. T. 2].

Appellant and co-defendant Garcia waived a jury trial on January 31, 1966 [C. T. 5], and on February 3, 1966, trial commenced without a jury before the Honorable Roger D. Foley, United States District Judge [R. T. 2]. 2/

On February 4, 1966, appellant was found guilty on Counts One and Two of the indictment as charged. Thereafter, on April 1, 1966, Judge Foley sentenced appellant to five years on each count to run concurrently, and recommended that he be incarcerated in a hospital-type institution where he may be treated [C. T. 14].

The United States District Court for the Southern District of California had jurisdiction of this case under Title 21, United States Code, Section 3231. The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174 provides:

> "Whoever . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug

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1/ "C. T." refers to Clerk's Transcript.

2/ "R. T." refers to Reporter's Transcript.

after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF THE CASE

A. Questions Presented:

1. Was the evidence sufficient to support a jury finding that defendant knew the narcotics were unlawfully imported?

2. Is the presumption set forth in Title 21, United States Code, Section 174 constitutional?

3. Was defendant denied the assistance of competent counsel?

B. Statement of Facts:

Agent Chris Saiz of the Federal Bureau of Narcotics met appellant Sanchez on December 8, 1965, as Saiz was buying

narcotics [R. T. 3]. Sanchez then told Saiz to call him regarding future purchases [R. T. 3]. On December 9, 1965, Saiz called Sanchez and told Sanchez he wanted to buy heroin [R. T. 3-4]. Sanchez said he would have the heroin on December 10, 1965, and directed Saiz to come to Sanchez's house to make the purchase on that date [R. T. 4]. On December 10, 1965, at 12:30 P. M., Saiz again conversed with Sanchez by telephone [R. T. 4, 5]. At about 1:15 P. M., Saiz met Sanchez at the corner of Laverne and Fourth Streets, Los Angeles, as had been arranged previously [R. T. 7-8]. At this meeting, Saiz and Sanchez talked about the delivery of the heroin [R. T. 8-9]. After several telephone calls were placed by Sanchez, Saiz and Sanchez returned to Sanchez's residence [R. T. 10]. Saiz left the area and returned at 3:00 P. M., at which time Sanchez entered Saiz's vehicle [R. T. 11-12]. Eventually, Sanchez met with co-defendant Garcia on the street while Agent Saiz remained in the Government vehicle [R. T. 20]. After he and Garcia had walked out-of-sight for a few minutes, Sanchez returned alone to Saiz's vehicle and told Saiz the heroin wasn't ready [R. T. 21].

Saiz then drove Sanchez back to Sanchez's house [R. T. 22]. Later, Saiz returned and picked up Sanchez [R. T. 27]. Sanchez then told Saiz the heroin was ready and asked Saiz for $100 for the one-half ounce of heroin Saiz was to buy [R. T. 28]. Saiz gave Sanchez the $100.00 [R. T. 28]. Sanchez then left the vehicle, walked out of Saiz's view, and returned to tell Saiz that he had given the money to Sanchez's associate [R. T. 28]. As directed by Sanchez, Saiz then drove to the intersection of Michigan and Marianna Streets

in Los Angeles [R. T. 28]. A few minutes later, Sanchez returned to the automobile, displayed two rubber condoms, and stated that he had "scored" [R. T. 29]. Sanchez refused to give Saiz the heroin, saying that he (Sanchez) would deliver it after Saiz joined Sanchez in injecting a portion of it [R. T. 29]. Shortly thereafter, Sanchez was arrested in the vehicle [R. T. 30-31].

IV

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT DEFENDANT KNEW THE NARCOTICS WERE ILLEGALLY IMPORTED.

At the trial, substantial evidence that defendant had actual possession of the narcotics was introduced [R. T. 2-3, 30]. From this fact, the jury could have presumed that defendant knew the narcotic had been imported unlawfully. 18 U. S. C. §174. It is conceded that Sanchez made no attempt to explain his possession of the narcotics to the jury [AOB 4]. [3/]

B. THE PRESUMPTION CREATED BY TITLE 18, UNITED STATES CODE, SECTION 174 IS CONSTITUTIONAL.

This and other courts repeatedly have held there is no merit in the contention that the presumption is unconstitutional.

Yee Hem v. United States, 268 U.S. 178 (1925);

Brown v. United States, 370 F.2d 874 (9th Cir. 1966), cert. denied, 386 U.S. 1039 (1966);

Ramirez v. United States, 350 F.2d 306 (9th Cir. 1965);

Bradford v. United States, 271 F.2d 58 (9th Cir. 1959).

C. APPELLANT WAS NOT DEPRIVED OF THE ASSISTANCE OF COMPETENT COUNSEL.

"A conviction may not be set aside on the ground of ineffective assistance of counsel unless trial counsel is so incompetent or inefficient as to make the trial a farce or a mockery of justice."

Dickinson v. United States, 366 F.2d 183, 185 (9th Cir. 1966);

Accord, Grove v. Wilson, 368 F.2d 414 (9th Cir. 1966);

Thomas v. United States, 363 F.2d 849 (9th Cir. 1966).

The most competent and effective counsel cannot offer evidence which does not exist, and not a shred of evidence is in the record to indicate that defense counsel could have established that appellant had no knowledge that the heroin was unlawfully

imported. As appellant concedes, counsel could not manufacture evidence, nor could he produce harmful or perjured testimony [AOB 7]. It cannot be assumed from the silent record before this Court that defense counsel had at his disposal affirmative exculpating evidence which could have been introduced at trial. See Dalrymple v. Wilson, supra.

Moreover, the Reporter's Transcript of the trial clearly reveals that defense counsel was not so ineffective as to make the trial a mockery and a farce. In this regard, it is significant that the trial judge commended defense counsel for his "fine defense" of appellant [R. T. 301-1].

It would be entirely inappropriate for this Court to hold that trial counsel was so ineffective as to make appellant's trial a farce, simply because counsel failed to produce evidence, when nothing in the record indicates that such evidence was available.

V

CONCLUSION

For the foregoing reasons, appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN

NO. 22586

IN THE UNITED STATES COURT OF APPEALS

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BILLY JOE MARTIN,

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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NO. 22586

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APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On April 26, 1967 the federal grand jury for the Southern District of California returned a two-count indictment (No. 947-SD) charging appellant in Count One with a violation of Title 21, United States Code, Section 174 (smuggling narcotics). In Count Two appellant was charged with a violation of Title 21, United States Code, Section 174 (concealment and transportation of illegally imported narcotics). Clerk's Transcript, pp. 2-3 (hereinafter referred to as C.T.).

On May 25, 1967 an omnibus hearing was held in open court, pursuant to local rules. At that time appellant was given an opportunity to indicate if there were any motion to suppress "admissions or confessions made by

defendant because of . . . (3) violation of the Miranda Rule . . . ." See specifically id. at 7. Appellant made no such motion. Id. Reporter's Transcript, pp. 2-4 (hereinafter referred to as R.T.).

On September 12, 1967 a trial by jury commenced in this matter. On September 13, 1967 appellant was found guilty of both counts of the indictment by a jury. C.T., p. 14.

On October 23, 1967 appellant was sentenced by the Honorable Fred Kunzel to a 10-year period of incarceration on each count, to run concurrently. Id., at 17. The court also recommended that the Attorney General designate appellant's place of confinement to be the state institution where appellant was presently serving s state sentence. Id. A timely Notice of Appeal was filed. Id. at 18.

The offenses occurred in the Southern District of California, and jurisdiction of the District Court was based on Title 21, United States Code, Section 174 and Title 18, United States Code, Section 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Section 1291 and 1294.

II.

STATUTES INVOLVED

Title 21, United States Codes, Section 174 reads in pertinent part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its

control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

III.

STATEMENT OF THE CASE

A. Questions Presented

1. Did the lower court err in holding that the warning given to appellant at the time of his arrest was defective and in violation of the Miranda rule?
2. Did the lower court err in permitting impeachment of appellant's false testimony regarding whether or not he had told customs officials of an individual named "Jupiter"?
3. Did the lower court impose a more severe sentence on appellant due to appellant's announced intention to appeal the conviction and judgment?

B. Statement of the Facts.

On March 29, 1967 Customs Inspector Raymond L. Geiger was on uty at the Port of Entry, San Ysidro (San Diego), California, inspecting ehicular traffic entering the United States from Mexico. R.T., pp. 7-8.

At approximately 11:50 p.m. appellant entered the United States from Mexico as the driver of a 1956 Buick. Id. at 8-9. Inspector Geiger inquired of appellant's citizenship, and appellant stated he was an American citizen. Id. at 9. In reponse to an inquiry as to what appellant was bringing from Mexico, appellant declared two pictures, two cats and a black hat. Id.

Inspector Geiger also asked appellant what he was doing in Mexico. Id. Appellant replied that he was just "out having a good time, partying." Id. Appellant went "into detail" about his trip, talking "about going down, partying, drinking and seeing the girls." Id. at 10.

Inspector Geiger took appellant to the secondary inspection area, and commenced to conduct a search of appellant's person. Id. Appellant was wearing a dark-brown suit coat when he entered the search room, id., and when appellant was riding in the car. Id. at 39, 40. In the search room, Inspector Geiger asked appellant to remove his coat, which appellant did, and Geiger took possession of the coat. Id. at 11. Geiger noted a heaviness and bulkiness on one side. Id. When Geiger started to look inside the coat, appellant said, "I bet I know what that is, somebody must have put that there." Id. at 32. This statement was not in response to any question put to appellant by Geiger. Id. Inside the coat Geiger found some pink tissue paper with five rubber contraceptives inside. Id. at 34. The contents of the rubber contraceptives was heroin. Id.

Inspector Geiger also found $551 on appellant. Id. at 43.

Appellant had conversations with Inspector Geiger, but never mentioned

anything with regard to a person named "Jupiter." Id. at 7-11, 32-43.

During the early morning hours of March 30, 1967 at the secondary inspection area at the Port of Entry, San Ysidro (San Diego), California, Customs Agent James Jackson had a conversation with appellant with regard to this incident. Id. at 19-20. Prior to Jackson's asking appellant any questions, he orally advised appellant as follows:

> "I advised Mr. Martin that he did have certain constitional rights, that he had a right to remain silent, that he didn't have to make any statements, sign any papers unless he so desired, that he was entitled to and would be provided with an attorney of his choice, and if he couldn't afford one, the government would provide one at any and all times of the proceedings relative to his interrogation." (Emphasis added.) Id. at 20.
>
> "He was advised that the statements he did make, if he chose to make any, could and might be used against him. I didn't say that they would be. I said they could and may be used against him." Id.

Appellant was then supplied with a "rights waiver" form, which he executed. Id. at 20-21. This form was marked for identification, but not received into evidence, id. at 35, 37, although appellant was not opposed to its being received into evidence. Id. at 18. The record is clear that the trial judge examined the "rights waiver" form. Id. at 22, 35, 37.

The advice contained in the "rights waiver" form is as follows:

"STATEMENT OF RIGHTS"

"Before we ask you any questions, it is my duty to advise you of your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court, or other proceedings.

"You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning.

"You may have an attorney appointed by the U. S. Commissioner or the Court to represent you if you cannot afford or otherwise obtain one.

"If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer.

"HOWEVER . . . . . .

"You may waive the right to advice of counsel and your right to remain silent and answer questions or make a statement without consulting a lawyer if you so desire.

- -

"WAIVER"

"I have had the above statements of my rights read and explained to me and fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or imunity. I was taken into custody at 11:51 P.M. (time), on 3/29/67 (date), and have

signed this document at 12:00 A.M. (time), on 3/30/67 (date).

Billy Joe Martin /s/
(name)

"Witness:

James W. Jackson /s/
(name)

Printice N. White /s/ "
(name)

Agent Jackson further testified as follows:

"Mr. Milchen: I will ask you, Mr. Jackson, if you explained to him [appellant] the right to have an attorney at the interview [after arrest]?

Mr. Jackson: At all stages of the proceedings.

Mr. Milchen: Did you specifically explain to him that he had a right to have an attorney at that interview?

Mr. Jackson: I don't recall that I worded it exactly like that or not." Id. at 23-24.

The trial court then commented with regard to the nature of the advice as follows:

"[T]he statements that were taken clearly indicates that Miranda was not complied with. Miranda provides that the burden of proof is upon the government to prove that the defendant intelligently and understandingly waived his right to have counsel present at the time his statement was taken, and that the burden is upon the government to prove that.

It says it so clearly that there isn't question about it." Id. at 21.

"Here is the oral advise: 'You may have an attorney appointed by the Commissioner or the Court to represent you if you cannot afford to or otherwise obtain one.'

"What should be stated and what I presume is being stated now is that, 'You have a right to have an attorney present at the interview and if you can't afford one, an attorney will be provided for you before we interview you.'

"Then he must understand it or must be shown that he understood that he is entitled to have an attorney present at the interview." Id. at 22.

Appellant, the court, and appellee are agreed that appellant's signing the "rights waiver" form would be prima facie evidence that appellant understood his rights. Id. at 23.

After being so advised, appellant made some damaging statements. Id. at 24-26. The court indicated that the admissions and confessions could not be introduced into evidence, in direct or rebuttal. Id. at 26, 27. Those damaging statements were not used in direct or rebuttal for any purpose by appellee. Id. at 7-11, 32-43, 43-45, 80-83.

Appellant did object to the introduction of appellant's statement either in direct or rebuttal for purposes of impeachment on important issues as well as collateral issues. Id. at 16, 17-18. However, after the trial court had ruled that the admissions and confessions could not be used, id. at 26, 27,

ppellant indicated that the only statements made by appellant which were ft related to appellant's having gone to a house of ill repute and that he got unk. Id. at 27. Counsel for appellant then stated:

"All right, if that's all that's going to come in, that all he told Mr. Jackson is that he went to the house of ill repute and that he got drunk, I would have no further objection." Id.

The lower court, using its discretion, refused to permit appellee to in- uire, once appellant testified, if appellant had ever been connected with a lony. Id. at 30. The nature and date of the conviction were not to be gone to. Id. The lower court threatened contempt upon counsel for appellee if e were to ask the question, and not merely sustain an objection thereto. Id. 30-31. As a result, appellee made no inquiry whatsoever of appellant with gard to the prior felony conviction. Id. at 57-66, 71-79.

In spite of the prohibition on appellee from going into the matter, appel- nt mentioned on direct examination that he was "out of prison," id. at 49, at he "'been locked up long time,'" id. at 51, and "me being locked up," id. n cross-examination, in response to an inquiry whether or not appellant ought it strange for "Jupiter" to give him a large sum of money, appellant sponded by stating in part that,"I had been in prison." Id. at 65.

Even after the prior felony conviction had been volunteered four times by ppellant, the trial court still refused to permit appellee to ask the question the existence of the prior felony conviction. Id. at 69-70. This colloquy ccurred when appellee was about to request the instruction concerning

impeachment of a defendant because of a prior felony conviction. Id. at 69-70.

The trial judge acknowledged that he was clearly abusing his discretion when he stated, "Of course, the government can appeal from my ruling." Id. at 29. He further stated that "I know the government can take an appeal and I don't like to take it upon myself to become a Court of Appeals, ..." Id. at 30.

Customs Agent James Jackson testified that the contraband in question had value. Id. at 45.

Appellant was the only witness in his defense, and related an incredible set of circumstances to explain how it came to be that heroin was located in his coat unknown to him. Id. at 48-65, 71-80. A person named "Jupiter" figured prominently in all parts of appellant's explanation. Id. at 49-54, 60-65, 71-76.

During cross-examination, the crucial colloquy occurred:

"Mr. Milchen: Did you tell the customs officials at the border about Jupiter?

"Mr. Martin: Yes, I told them.

"Mr. Ely: Your Honor, could we approach the bench on this?

"The Court: Yes.

(The following proceedings were had at the bench, outside the hearing of the jury.)

"Mr. Ely: That is the whole point. Mr. Milchen just sidestepped the order given. I think the whole point of keeping

that out was to keep the jury from knowing that certain things were not said at the border.

"The Court: Well, no harm has been done as yet. He said he did tell them about Mr. Jupiter.

"Mr. Ely: Yes. Well, I would like the course of questioning to be discontinued immediately as to what he said at the border.

"Mr. Milchen: I wasn't going to go into it any further.

"The Court: All right, no harm has been done." Id. at 75-76.

The matter was not gone into any further in cross-examination. Id. at 76-80.

In rebuttal, appellee called Customs Agent James Jackson. Id. at 80. Before he testified, the following colloquy occurred out of the presence of the jury:

"Mr. Milchen: I desire to ask Mr. Jackson if the defendant ever mentioned a man named Jupiter to him.

"Mr. Ely: That I would certainly object to as being part of an admission in a statement of course, and your Honor's order is that nothing in that statement is supposed to come out, except that he was in a whore house and he was drunk. That is exactly the one thing I was trying to keep out, the failure to mention Jupiter, that is what the motion was all about.

"The Court: Oh, no.

"Mr. Ely: Well, there was a change . . .

"The Court: There were some poisonous statements made.

"Mr. Ely: I think Mr. Milchen's question was improper when he asked the defendant, but apparently your view was that the harm had been minimal, whatever it was, and having already ruled on it, I think this is just compounding it. I would definitely object to asking him this question. It's going into that part of the statement which was suppressed under Miranda.

"The Court: I think I'm going to allow it under the theory that it is a matter of collateral and can be used for the purpose of impeachment. All right, go ahead." Id. at 80-81.

Jackson testified that he did not recall appellant ever saying anything to him about a man named "Jupiter." Id. at 82.

Appellee accepts the version of the facts that occurred after the jury returned its verdict, and appellant first indicated his intention to appeal this case. Appellant's Brief, pp. 8-9. Appellee however would supplement those facts with those which occurred at the acutal time of sentencing. Appellant failed to designate those proceedings as part of the record at the time appellant filed his opening brief. However, since that time, appellant has joined appellee in amending the record on appeal to include the proceedings at that time. The crucial statements that bear on this issue that occurred then are set forth as

llows:

"Mr. Ely: Well, certainly, in order to - - We've already discussed whether or not an intention to appeal is to be a factor - -

"The Court: Oh, that's not a factor at all.

"Mr. Ely: Well, that being so, I'm sure that - - "R.T., p. 131.

The question of the severity of the sentence, being above the mandatory inimum, was also influenced by appellant's refusal to talk with the Probation Department about the offense. The record shows as follows:

"The Court: Well, would you talk to the Probation Officer?

"Defendant: No, I refuse to talk. I'm ready for sentence.

"The Court: What?

"Mr. Ely: He will not apparently, your Honor." Id. at 132.

Defendant also had a prior felony conviction for rape for which he served very long period of time in San Quentin. Id. Appellant also had a conviction in his youth. Id.

The amount of contraband, five ounces of heroin, was recognized to be a ubstantial quantity at the time of sentencing. Id. at 133.

There was nothing extenuating in appellant's situation, as found by the ower court. Id. at 133-34. However, the lower court did show appellant eneficent consideration by recommending to the Attorney General that his lace of confinement be the state institute which appellant was then confined. d. at 134.

IV.

ARGUMENT

A. THE ADMONITION GIVEN TO APPELLANT WITH REGARD TO THE NATURE OF HIS CONSTITUTIONAL RIGHTS WAS IN COMPLETE COMPLIANCE WITH THE REQUIREMENTS OF MIRANDA.

1. The Oral and Written Advice.

In Miranda v. Arizona, 384 U.S. 436 (1966), the Court indicated its holding as follows:

"To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently

waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id. at 478-79.

The Court also said specifically with regard to the right to have an attorney present during interrogation the following:

"Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation under the system for protecting the privilege we delineate today." Id. at 471.

Appellee is put in the unusual position of arguing for an affirmance of the judgment below based on a clearly erroneous ruling by the trial judge, which in turn led to the alleged erroneous ruling urged by appellant. However, appellee will so argue that the oral and written advice given to appellant with regard to his constitutional rights was in complete compliance with Miranda, particularly as interpreted by this court in Bell v. United States, 382 F.2d 985 (9th Cir. 1967). The short answer to this appeal is to hold that Miranda and Bell were fulfilled. What followed in the lower court then becomes inconsequential.

To complete the legal picture with regard to the rendering of advice to criminal defendants concerning the nature of their constitutional rights, consideration must be given to Bell v. United States, supra. In Bell defendant was not advised orally on the subject. He was presented with a document

containing clearly valid advice concerning his rights. Defendant signed the document, and indicated that he could read and write. Id. at 986. In response to the argument that defendant should have been given oral advice, this court said at 987:

"This is absurd. If appellant read and understood the written advice, then he acquired knowledge of his rights in a very satisfactory way. There is no requirement as to the precise manner in which police communicate the required warnings to one suspected of crime. The requirement is that the police fully advise such a person of his rights, and appellant made no showing that he did not read or understand the written warnings which were presented to him."

Appellant states that the ruling that Miranda had been violated was "plainly correct." Appellant's Brief, pp. 10, 15. The alleged defect went to whether or not appellant was advised that he had a right to the presence of an attorney during the interrogation, and whether or not he waived that right. Id. Another issue raised with regard to the warnings given relates to whether or not appellant was advised of the consequences of making a statement at that time. Id. at 15-16, fn. 4. These arguments were made by appellant without the benefit of the presence of the "rights waiver" form which the Court below considered in ruling on the admissibility of the damaging admissions made by appellant.

The record clearly shows that appellant was adequately warned of his constitutional rights.

Appellant was given both oral and written advice, thus going beyond Bell where only written advice was given. With regard to the specific issue in question, he was orally advised that "if he couldn't afford one [an attorney], the government would provide one any and all times of the proceedings relative to his interrogation." R.T., p. 20. The written advice on this subject was as follows:

"You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning.

"You may have an attorney appointed by the U.S.Commissioner or the Court to represent you if you cannot afford or otherwise obtain one.

"If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer.

"HOWEVER . . . . . .

"You may waive the right to advice of counsel and your right to remain silent and answer questions or make a statement without consulting a lawyer if you so desire." C.T., p. .

The advice is so clear on its fact that it denies logic to argue that appellant was not warned that he had a right to have an attorney present at that interview.

The lower court apparently based its argument on the idea that appellant was not warned that he had a right to have his appointed, as distinct from

retained, counsel present at that interview. R.T., p. 22. However, Agent Jackson orally told appellant that the government would provide him with an attorney "at any and all times of the proceedings relative to his interrogation." Id. at 20. The "rights waiver" form specifically informed appellant that he had a right to have an attorney "present with you during questioning." C.T. p. . The form then explained that appellant would be appointed an attorney if he could not afford one. Id. The form explicitly informed appellant that he could terminate the questioning at any time if he desired to consult an attorney. Id. This information goes far beyond Miranda. Finally the advice concerning waiving his rights specifically indicates that the absence of counsel is contemplated at that questioning if appellant decided to waive his right to an attorney at that time. Id.

In considering this issue, it cannot be emphasized too heavily that the only factual basis for any holding was the "rights waiver" form and the testimony as to the oral statements by Agent Jackson. Appellant offered no evidence whatsoever on the nature of the advice as to his constitutional rights that was given to him. There was no contradiction at all on the issue of what was orally said on this issue or what was contained in the written document. There was no conflict in the evidence, where one version was accepted and the other rejected by the lower court. There is no conflict as to what words and writings were spoken and written on the nature of appellant's constitutional rights.

2. Precision v. Sufficiency

To argue that the advice is defective for lack of a specific statement to the effect that appellant had a right to an appointed counsel at that questioning is to quibble about the preciseness of the warning and aims not at the sufficiency of the warning. In context, both the oral and written advice clearly informed appellant that he had a right to an appointed counsel at that questioning.

Bell makes it quite clear that "preciseness" is not the crucial issue in determining the sufficiency of advice given. Bell v. United States, supra at 987. "There is no requirement as to the precise manner in which police communicate warnings to one suspected of crime." Id. The fact that, in the written advice, the statement about appointing counsel (if appellant could not afford one) follows the statement about the right to have an attorney present at that questioning - - this fact goes to "preciseness" and not to sufficiency. In context, there is no question that appellant fully knew that he could have an attorney, retained or appointed, at that interview.

Similarly Agent Jackson's phraseology was to the effect that appellant could have retained or appointed counsel "at any and all times of the proceedings relative to his interrogation." R.T., p. 20. This phraseology goes to the "preciseness" of the language used, and not to the matter of how sufficiently that language advised appellant that he could have a lawyer at that very time. Appellee concedes, as did Agent Jackson did on the witness stand, that appellant was not specifically told the words "you have a right

to have an appointed counsel at this time." The advice was not "worded . . . exactly like that . . .," id. at 24 , but it was clearly and unequivocally and sufficiently given.

The precision of the oral advice was also admittedly defective with regard to the consequences of appellant's talking at that time. Agent Jackson told appellant that his statements "could and might be used against him." Id. at 20. He did not say that they would be, but that they "could and might be used against him." Id. On the other hand, the written advice conforms precisely to the requirements of Miranda on this issue by using the exact language of Miranda , namely that the statements "can be used against" appellant in court. Miranda v. Arizona, supra at 479; C.T., p. .

The point is that the written advice meets the precision that Bell does not require, and the oral advice clearly is sufficient, though not precise.

3. The Waiver

The lower court attributed part of the alleged deficiency of the Miranda warning on the fact that the "burden of proof is upon the government to prove that the defendant intelligently and understandingly waived his right to have counsel present at the time his statement was taken, and that the burden is upon the government to prove that." R.T., p. 21. However, appellant, appellee, and the lower court all agreed that appellant's signing of the "rights waiver" form constituted prima facie evidence that appellant did knowingly and understandingly waive his rights. Id. at 23. Thus, appellee had met its

ırden in this area. Appellant made no showing whatsoever that he did not ad or understand the written advice given him. Bell requires that a criminal efendant must make some such showing in order to avoid the consequences of s written waiver. Bell v. United States, supra at 987. In the facts thus esented, there is no question but that appellant did waive his rights.

Appellant specifically waived the right to have an attorney, retained or ppointed, present at the time he made statements to Agent Jackson. The ights waiver" form states that "you may waive the right to advice of counsel . . and answer questions or make a statement without consulting a lawyer you so desire." C.T., p. . The idea is clearly presented that appellant ould have counsel present at that interview or waive his counsel's presence. is advice about waiver occurs after "counsel" has been "defined" to include th retained or appointed counsel. Id. There then follows the waiver in ese words:

"I have had the above statements of my rights read and explained to me and fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or imunity. I was taken into custody at 11:57 p.m. (time), on 3-29-67 (date), and have signed this document at 12:00 a.m. (time), on 3-30-67 (date).

Billy Joe Martin
(name)

Witnesses:

James W. Jackson
(name

Prentice N. White"
(name)

4. Explaining the Ruling Below

With the record so clear below on the issue of the sufficiency of he nature of the advice given to appellant with regard to his constitutional ights, appellee respectfully submits that the lower court rendered a clearly rroneous ruling, with no factual basis, on this issue. If this court so inds, the alleged error derivative from the ruling evaporates, and the conviction should be affirmed.

Appellee also recognizes the extreme difficulty in asking this court to overturn a ruling by the lower court on a factual issue. Thus, appellee respectfully tenders an explanation of the ruling below, supported by the evidence in the record, which explanation does not rest on a factual showing by appellant that would sustain the ruling. In the first place, it is undeniably clear that appellee did not in this case, and does not have a right to appeal an adverse jury decision. Thus, the lower court was equipped with the ability to rule adversely to appellee, knowing that the only instance when such a ruling might be called into question occurs when appellant takes an appeal. The lower court was well aware that appellant could not be harmed by a ruling favorable to him and adverse to appellee, unless unusual circumstances arose. Unfortunately, those unusual circumstances have arisen in this case.

The "unusual"circumstances arise from the fact that Groshart v. United States, __ F.2d ___(9th Cir. March 27, 1968) applies to this appeal, whereas the law prior to Groshart prevailed at the time of trial.

The simple fact is that the lower court was bending over backwards to ist appellant in this case, knowing the government could not appeal any ng. This fact is demonstrated by the lower court's ruling on the issue ntroducing into evidence the fact of appellant's prior felony conviction. s too well established to cite authority that the fact of a prior felony con- tion is admissible. The date and nature of the felony conviction are tters for judicial discretion, but not the existence of the conviction itself. spite of this fact, the lower court refused any such evidence to be elicited appellee, and even refused to permit it after appellant had volunteered that t four times. Id. at 49, 51, 65. That the lower court was clearly in error s demonstrated twice by the court itself when it stated that "the govern- nt can appeal from my ruling," id. at 29 and that "I know the government n take an appeal and I don't like to take it upon myself to become a Court Appeals, ..." Id. at 30.

The issue of the prior felony conviction and the ruling of its inadmissibility es to show the lower court's disposition on rulings favorable to appellant d adverse to appellee.

The lower court, as do many trial courts, looked at the evidence of over- helming guilt, and unilaterally decided to control the amount of evidence on e issue of guilt, regardless of its admissibility or inadmissibility. The case gainst appellant was overwhelming just by virtue of the fact that the contra- and was found on his person, id. at 34, and that appellant had acknowledged s presence by spontaneously stating "I bet I know what that is, somebody

must have put that there." Id. at 32. Any more evidence tendered by appellee would be basically unnecessary, regardless of its admissibility.

In view of such a case, it is understandable that the lower court could unilaterally provide a defendant under such circumstances with whatever physhological benefits that might accrue from favorable rulings. It is more understandable in view of the certain conviction, and the absence of appeal by appellee.

The shock registered by the lower court immediately after the jury returned the verdict at appellant's intention to appeal, id. at 126a, is further evidence that the lower court deliberately made rulings favorable to appellant, regardless of the correctness of those rulings. In fact, the trial judge announced that "there was nothing in this case where . . . anything prejudicial to the defendant came in." Id.

However, these facts are presented only to explain the "extra-judicial" reasons behind the ruling that the Miranda requirements were not met. They must be presented because the factual basis simply does not exist.

Now appellant tries to take advantage of the clearly erroneous, but favorable ruling, to avail himself of the intervening rule of Groshart. Appellant should not be permitted to utilize the erroneous ruling to upset what then was a clearly correct ruling according to the law existing at that time. This court should take the whole situation into consideration, and overturn the ruling on the admissibility of the statements, holding that Miranda and Bell had been complied with. Then, there is no Groshart issue that needs to

e analyzed.

. ASSUMING THAT THE STATEMENTS WERE TAKEN IN VIOLATION OF MIRANDA, IMPEACHMENT OF APPELLANT WAS PROPER.

1. Waiver of Objection

Appellee starts with the law as now set forth in Groshart v. United States, supra. Thus, the main portion of Appellant's Brief, arguing for a reversal of the rule of Walder is superfluous, and requires no attention.

First, appellee submits that appellant has not preserved his record on appeal on this issue. When the question of appellant's statements to Agent Jackson first arose, appellant indicated that he would have no objection to the introduction into evidence of the fact that appellant had gone to a house of ill repute and had become inebreated. R.T.,p.27. Presumably those matters were thus conceded by appellant to be admissible for purpose of impeachment if appellant testified otherwise. Id.

Appellant testified on direct examination that "we [Jupiter and appellant] went to this house everybody had been talking about." Id. at 52. Wnen asked if he was referring to a house of "ill fame," appellant responded in the affirmative. Id. Further, appellant testified that Jupiter gave him some tequilla, id., which must have been drugged because he had only one drink. Id. at 73.

Thus, the situation arose during the trial where appellant testified on the two items which appellant and his counsel had waived any objection to

mpeachment by use of the statements ruled to have been taken in violation of Miranda. The two subject matters involved a person named Jupiter. The nquiry on cross-examination was entirely proper, in view of appellant's estimony on direct and the waived objection.

It is most difficult to visualize appellant's successfully claiming reversal rror on a matter which he expressly waived in the lower court.

It is true that appellant did tender what could be construed to be an bjection to the questioning on the ground that the question was impeachment y using statements allegedly taken in violation of Miranda. Id. at 75-76. Iowever, this objection came after appellant had apparently stated that he ould not object to a question on that specific matter. Id. at 27. Even if he question was objectionable as a matter of law, appellant had virtually ulled appellee into relying on appellant's apparent consent to an inquiry into hose matters. The later objection, appellee submits, cannot now be held o successfully vitiate appellant's waiver of objection.

2. Voluntary Falsehood by Appellant

Second, it is apparent that the objection to the crucial question was on he ground that it was improper impeachment by use of statements allegedly aken in violation of Miranda. Id. at 75-76. There was no objection on the asis that the cross-examination itself was improper because the matter had ot been gone into on direct examination, or any other ground. Any error on hat ground has not been preserved for this court's consideration. Rule 18(2) d), Rules of the Court of Appeals for the Ninth Circuit. Thus, there is no

istinction between the fact that appellee initiated the inquiry on "Jupiter" nd that appellant did not voluntarily bring the matter into issue. The con- ext in which the question arose and the nature of the objection compels the conclusion that the issue can be considered as though appellant volunteered he falsehood about whether or not he mentioned "Jupiter" to the customs fficials.

Viewing the matter thusly, the situation is not a Groshart case, but a case on all fours with United States v. Armetta, 378 U.S. 658, 662 (2nd Cir. 1967), cited with approval in Groshart at page 9, footnote 4 of the slipsheet as follows:

> "Of course, the inability of the prosecution to use the defendant's statements would not prevent their admission where the defendant himself voluntarily seeks their introduction. . . . . [citing Armetta]."

A defendant can "voluntarily" introduce evidence by eliciting it in direct examination or by failing to object during cross-examination. The case at bar is of the latter nature, and falls within the exception noted in Groshart, and approved by Armetta.

3. Propriety of the Inquiry as Cross-Examination

Assuming that Groshart might apply to the question asked in this case, the question was still proper cross-examination and not in violation of Groshart. The specific inquiry was whether or not appellant had told "customs officials at the border about Jupiter." Id. at 75. Previously Customs Inspector Geiger had testified that he was a Customs offical,

Id. at 7, and was working at the border at the time and place in question. Id. at 7-8. Geiger had a conversation with appellant with regard to appellant's presence in Mexico. Id. at 9. Appellant went "into detail" about the trip, talking about "going down, partying, drinking and seeing the girls." Id. Upon discovery of the contraband by Geiger, appellant made reference to another person. Id. at 32. Appellant never said anything about someone named "Jupiter" to Inspector Geiger. Id. at 7-11, 32-43.

Thus, with Geiger's testimony on the record, the question can properly be construed to refer to Geiger as a "customs official." Geiger's testimony did not contain any reference to "Jupiter," and thus an inquiry into whether or not appellant told Geiger about "Jupiter" was relevant and proper. This fact is particularly true in view of appellant's testimony on direct examination that he had conversation with Geiger at the border. Id. at 54-57.

4. Distinguishing Groshart

Finally, assuming that Groshart might apply and that the question went to impeachment not of what was said to Geiger, but what was said to Agent Jackson in the Miranda situation, appellee submits that Groshart is clearly distinguishable. Groshart dealt with statements that were actually made, and later used to impeach the defendant. The case at bar deals with silence, namely statements that were not made. Silence means so many things that it means nothing.

The failure by appellant to mention "Jupiter" might have resulted, as appellant suggested in his brief, from that failure by Agent Jackson to make

specific inquiry on the subject. Appellant's Brief, p. 35. Appellant complains of this fact, but offers only a California, not a federal, case in support of his contention.

The point is that appellant lied about what he told both Geiger and Jackson. He perjured himself by claiming to have made statements that he did not in fact make. The existence of those statements was in issue, and not the content thereof, which was the issue in Groshart.

C. THE TRIAL JUDGE DID NOT IMPOSE A MORE SEVERE SENTENCE ON APPELLANT BECAUSE APPELLANT INDICATED HIS PLAN TO APPEAL.

Appellant notes portion of the record in which the lower court did announce that he was going to take the possibility of appeal into consideration at the time of sentencing. Appellant's Brief, p. 41; R.T., p. 126a. However, appellant did not designate the proceedings at the actual time of sentencing as part of the record when he wrote his brief. Those proceedings are now part of the record on appeal.

Regardless of the law cited by appellant, the transcript of the proceedings at the actual time of sentencing reflects that the question of taking an appeal was not any factor at all in the sentencing. The following colloquy between the lower court and counsel for appellant makes that undeniably clear:

"Mr. Ely: Well, certainly, in order to - - We've already discussed whether or not an intention to appeal is to be a factor - -

"The Court: Oh, that's not a factor at all.

"Mr. Ely: Well, that being so, I'm sure that - -" Id. at 131.

There were factors which warranted the imposition of more than the mandatory sentence in this case, including:

(1) the absolute refusal of appellant to talk with the Probation Department, id. at 132;

(2) his prior criminal record, id.; and

(3) the finding that there was nothing extenuating or mitigating in appellant's behalf. Id. at 133-34.

Finally, the fact that the lower court recommended to the Attorney General that appellant's place of confinement be designated as the state institution where he was then confined, id., at 134, is inconsistent with the argument that the lower court was imposing a more severe sentence on appellant and oppressing him because he desired to appeal. If the lower court was really doing that, the lower court could have given appellant up to 40 years, and not make such a recommendation to the Attorney General.

V.

CONCLUSION

Appellee respectfully submits that appellant's conviction should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney

JOSEPH A. MILCHEN,
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joseph A. Milchen

JOSEPH A. MILCHEN

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARNABY ASHFORD BLOOMER, Appellant, vs. NITED STATES OF AMERICA, Appellee.	NO. 22585

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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United States Attorney

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United States of America

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARNABY ASHFORD BLOOMER,	)	
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Appellant,	)	
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARNABY ASHFORD BLOOMER, Appellant,	)	
vs.	)	NO. 22585
UNITED STATES OF AMERICA, Appellee.	)	

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in Count Four of a four-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in all four counts of a four-count indictment.

Count One alleged that appellant conspired with the other three defendants, Ayala, Gorrell, and McMullen, to smuggle marihuana into the United States.

Count Two alleged that defendant Ayala smuggled in 225 pounds of marihuana and the appellant and the two other defendants knowingly aided and abetted therein.

Count Three alleged that defendant Ayala knowingly transported and facilitated the transportation and concealment of 225 pounds of contraband marihuana and appellant and the two other defendants aided and abetted therein.

Count Four alleged that appellant knowingly received, concealed and facilitated the transportation and concealment of 225 pounds of contraband marihuana, aided and abetted by the other three defendants.

Defendant McMullen was a fugitive and defendant Gorrell had been found insane by the trial Court, and consequently neither of those two defendants went to trial [R.T. 78-79].[1] The case against the other defendant, Mr. Ayala, was dismissed by the trial Court because the government refused to reveal the informant [R.T. 271].

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[1] "R.T." refers to the Reporter's Transcript of Proceedings.

Counts One, Two, and Three against the appellant were dismissed by the trial Court [R.T. 226-227, 233, 279], and appellant was found guilty by the jury as charged in Count Four on August 25, 1967 [R.T. 317-318]. Thereafter, on October 20, 1967, appellant was committed to the custody of the Attorney General for a period of five (5) years on Count Four [C.T. 41].[2]

III

ERROR SPECIFIED

Appellant specified the following points upon appeal:

"I. Defendant's conviction must be reversed as the jury commissioner failed in his affirmative, constitutional duty to ensure that the jury panel fairly represented a cross-section of the community from which it was selected.

"II. The failure of the prosecution to reveal the identity of the alleged informer requires the reversal of defendant's conviction.

"III. There being no showing of knowledge of the presence of the narcotics, the defendant's conviction must be reversed.

---

[2] "C.T." refers to Clerk's Transcript on Appeal.

"IV. United States Custom Agents' practice of conducting "border searches" is violation of the Fourth and Sixth Amendments of the Constitution of the United States; and requires reversal in this case."

IV

STATEMENT OF THE FACTS

On January 6, 1967, defendant Ayala entered the United States from Mexico at San Ysidro, California, driving a 1958 Oldsmobile [R.T. 80-82]. His wife and four children were with him and he said they were just going to wash, so all they had was laundry in the car [R.T. 82].

On cross-examination, the primary inspector, Mr. Yates, testified that he had not been alerted that this car might contain contraband [R.T. 84-85].

Customs Agent Gates testified that he observed Ayala in Inspector Yates' traffic lane, noticed the car bore California plates YWR-583, the vehicle he was waiting for, and kept it under surveillance [R.T. 87-88]. Ayala parked the vehicle in front of the San Ysidro Post Office and he, his wife, and four children alighted with some laundry and walked back toward the border to a laundromat [R.T. 89]. The car was kept under surveillance and no one put anything in the car [R.T. 90-92]. Ayala was questioned at the laundromat by Agent Gates [R.T. 94-97], and when asked who the car belonged to stated that the day before he had gone to Los

Angeles with an "Oscar Lopez" who deals in used cars in Tijuana. Lopez had purchased the car, and Ayala was keeping the car until it could be legally exported the following day [R.T. 97]. Ayala told Gates he had parked up by the Post Office because he had battery trouble and a friend, whom he declined to identify, lived nearby and could help him start the car if he had trouble [R.T. 95-96]. He also told Gates the keys were in the ignition [R.T. 96].

On cross-examination Agent Gates testified he was waiting for this particular vehicle because of a telephone call; that he believed it was a local call; that it was not from another agent; that it was not from Mexico; that the caller was a Mexican, not a government employee on a salary; that he identified himself and Gates knew his voice [R.T. 99-100]. The Government claimed the privilege not to reveal the identity of the informant [R.T. 99].

Appellant Bloomer's trial counsel, Mr. Clarke, then questioned Agent Gates on voir dire with respect to the informant out of the presence of the jury, and Agent Gates testified that he received the telephone call about twelve noon at his office in San Ysidro, and was informed a vehicle would be passing the border sometime after 4:00 p.m., and would probably be parked somewhere in the San Ysidro area and would have marihuana therein [R.T. 114]. Agent Gates further testified he had obtained information from this individual about twelve times before and the information

generally proved accurate; that the caller spoke English but was a Mexican citizen. The informant gave the license number of a 1955 blue Oldsmobile, but gave no information as to who might be driving the car [R.T. 116].

Customs Agent Aros testified he participated in the surveillance of the Oldsmobile and parked a short distance from the Oldsmobile in the area of the Post Office [R.T. 134]. He observed a red Jaguar containing two individuals come toward him on San Ysidro Boulevard, make a right turn and go past the Oldsmobile and out of sight [R.T. 135]. Five or ten minutes later Agent Aros was down at the laundry with Agent Gates on San Ysidro Boulevard and he observed the red Jaguar pass going in the opposite direction with a lone occupant; he followed the Jaguar [R.T. 135-136].

Agent Aros also testified that he questioned defendant Ayala and Ayala told him a "Juan Lopez" paid him $20.00 to drive the car over and park it in front of the Post Office at San Ysidro [R.T. 142-143].

Customs Agent Jackson testified he also had the Oldsmobile under surveillance near the Post Office and observed a red Jaguar proceeding southward on San Ysidro Boulevard toward the border with two people in it [R.T. 149-150]. Then perhaps a minute later, he noted a tall slender individual walking northward on San Ysidro, rounded the corner at West Olive, approached the Oldsmobile and got in it, turned the lights on, and he believed turned the motor

on [R.T. 151].

The officers then approached the Oldsmobile and the occupant identified himself as Barnaby A. Bloomer, the appellant. Appellant stated the car belonged to a friend, "John Cambro", and he was going to drive the car back to Los Angeles for Mr. Cambro and declined to answer where Mr. Cambro was [R.T. 152-153]. The officers then discovered the presence of marihuana bricks in the door panels and placed appellant under arrest [R.T. 153-154]. Agent Jackson found the registration on the Oldsmobile which indicated the car belonged to a John Cambro [Government Exhibit No. 2, R.T. 154].

Later Jackson saw the red Jaguar where Agent Aros had stopped it on 27th Street; the driver was David Gorrell. He searched the Jaguar and found a note pad (Government Exhibit No. 3), several small screwdrivers, a walkie-talkie radio, a pair of binoculars, small alligator clips and wire [R.T. 156]. The red Jaguar was registered to David Gorrell [R.T. 158]. The Oldsmobile was loaded in such a manner that it would necessitate use of both a Phillips and normal screwdriver and both kinds were in the Jaguar [R.T. 158-159]. There were notations on both the note pad (Government's Exhibit No. 3) and the envelope (Government's Exhibit No. 6) which were found in the Jaguar [R.T. 159-160, 195-196], said notations including reference to a Phillips screwdriver, wrench for "pannels," grass, Ks, various numbers, etc. (See

Exhibits No. 3 and 6).

Agent Jackson testified that marihuana was referred to as grass, hay, pot, china, weed, and the packages as kilos, bricks, kees, k's [R.T. 183-186].

Appellant's statements regarding Cambro were stricken and the jury admonished to disregard them [R.T. 187-194].

Agent Jackson also testified that the value of marihuana in Mexico at the time of the offense was $30.00 to $50.00 per kilo, probably in this load $35.00 a kilo. There were 100 kilos in this load with a value in the Los Angeles area of about $150.00 a kilo [R.T. 197-198].

Customs Investigator Hanson testified he drove the Oldsmobile back to the Port of Entry, searched it, and found the marihuana [R.T. 198-201]. Customs Investigator Meiger testified that he checked the address 401 Sepulveda Boulevard, Los Angeles (on Government's Exhibit No. 2) and found there was no such address and could not locate any subject by the name of John Cambro in the vicinity or the area. He also talked to the salesman and contract manager at Buster's Car Lot [R.T. 207-209].

Customs Investigator Gerhart testified he could not locate an Oscar Lopez dealing in used cars in Tijuana [R.T. 210].

The chain of custody and testimony of the chemist that the contraband was marihuana was stipulated to by

appellant [R.T. 216-217]. Government's Exhibits Nos. 1, 2, 3, 4, 5, and 6 were received in evidence [R.T. 225].

V

ARGUMENT

A. THE JURY COMMISSIONER PROPERLY PERFORMED HIS DUTY TO INSURE THAT THE JURY PANEL FAIRLY REPRESENTED A CROSS-SECTION OF THE COMMUNITY.

From the transcript it is clear that the jury commissioner's main source of selection was a matter of mere chance. He took a majority of the names by selection of the bottom name of every fourth column in the telephone directory [R.T. 38]. Such a selection certainly doesn't admit of discrimination nor limitation except perhaps with respect to those households without telephones which in this day and age is minimal. Certainly this method of selection meets Justice Frankfurter's test in Cassell v. Texas, 339 U.S. 282, at 291 (1949) as to "the uncontrolled caprices of chance" being one valid method of selection.

The jury commissioner also made himself aware of the significant identifiable elements in the community [R.T. 29, 34]. He followed a "more or less systemized procedure for contacting responsible members or organizations within the class to obtain names . . . . of those likely to be available and qualified" as recommended in Brooks v. Beto,

366 F.2d 1, at 23, 5th Cir. (1966), cert. denied, 386 U.S. 975, reh. denied, 386 U.S. 1043 [R.T. 29-30, 34]. In fact, the jury commissioner contacted responsible members and organizations within the classes mentioned in the transcript [R.T. 29, 40].

That the jury commissioner was aware of "significant identifiable elements" in this community is evidenced by the references to the following: "the Japanese telephone directory;" . . . "a list . . . of the local Filipinos;" . . . "some 300 names from the NAACP;" . . . "a list of the Jewish Association." Not only was he aware of such organizations but, contrary to appellant's suggestion that 60 percent of the jury rolls were made up of names chosen from associations such as the Rotary Club, the Fine Arts Society, and the Zwack Rowing Club (Appellant's Brief, p. 7), the jury commissioner testified that only "6 or 7 percent" of the names on the jury roll were taken from the various social clubs mentioned above [R.T. 38].

The defendants have the burden of proof to show that the system of jury selection is illegal (Swain v. Alabama, 380 U.S. 202, 1965), and in the case at bar there is no statistical information whatsoever with which to compare the composition of the jury panel and the population.

Furthermore, it cannot be asserted that discrimination was practiced with respect to the economic structure of the community. There is absolutely no showing that the

commissioner discriminated against lower economic groups or sought a constitutionally impermissable "blue ribbon" jury.

In fact, as Judge Copple states, "you can't avoid the fact that the result is certainly some test of the system." [R.T. 42] He further stated, "I would certainly want the record to show that during the five or six jury trials that "I've had here in the last two weeks, that there has certainly been a good cross-section both by color and race, by sex, by age, by apparent income bracket and occupation, represented on the jury panels." [R.T. 42].

Thus, tested by the legal principles involved, the testimony, or the results, we can come to no conclusion but that the jury commissioner's selection process was "reasonably designed to produce a representative cross-section of the community in the light of practical means available" (United States v. Greenberg, 200 F. Supp. 382, 389, S.D.N.Y. 1961) and that the jury commissioner properly performed his duty.

B. THE GOVERNMENT WAS NOT OBLIGATED TO REVEAL THE IDENTITY OF THE INFORMER AND FAILURE TO DO SO DOES NOT WARRANT A REVERSAL.

The appellant bases his case for disclosure of the informant on the Sixth Amendment right to confront witnesses against him (Appellant's Brief, p. 9); however, this right is "to secure the accused in the right to be tried by only

uch witnesses as meet him face to face . . ."

Curtis v. Rives, 123 F. 2d 936, 938
(C.A.D.C. 1941)

t does not apply to an informant who is absent from the
rial.

Dear Check Quong v. United States,
160 F.2d 251, 253 (C.A.D.C. 1947)

From a reading of the transcript it is obvious that he only possible "testimony" of the informant that could ave been used against the appellant by the jury was Agent ates' testimony that he was waiting for this particular car ecause of a telephone call from a Mexican [R.T. 99-100].

No hearsay statements ("testimony") of the inform-nt were used; so it is difficult to understand how appellant as deprived of his right to confront witnesses against him.

As was stated in the Curtis case cited supra, What the appellant really charges is not denial of the right f confrontation as such, but suppression or concealment of vidence or witnesses favorable to him" (See Appellant's rief, p. 9, lines 4-21). Since such a suppression or con-ealment might be violative of appellant's Fifth Amendment ue process rights, let us examine the record in that regard.

Appellant seems to rely basically upon Roviaro v. nited States, 353 U.S. 53 (1957); yet in that case there as evidence the informant "had taken a material part in ringing about possession of certain drugs by the accused,

had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged." (Rovario, supra, at p. 55)

Nothing even remotely similar to the facts quoted above in Rovario are indicated in our record. The informant was not present when appellant got in the Oldsmobile; appellant was the "lone occupant" [R.T. 152]. Nor is there any showing anywhere that the informant took a material part in bringing about appellant's possession or might be a material witness as to whether the accused knowingly received the marihuana as charged.

As has been stated by this Circuit, "In Roviaro, supra, the informant was a participant in the crime. That the informant was such here is mere hopeful guessing on appellant's part."

Hurst v. United States, 344 F.2d 327,
328 (9th Cir. 1965)

In Roviaro the court also noted that the informant "was the sole participant, other than the accused, in the transaction charged" (at p. 64); and consequently it was apparent his testimony may have been "relevant and helpful to the defense." But such is not the case here. In the instant case defendant Ayala drove the car across the line and was present and testified, and defendant Gorrell was apprehended near the scene. There is no evidence or even

int of the informant's presence except possibly at the time he car was loaded in Mexico [R.T. 263-272]. And in that egard, it is to be noted that appellant was only tried on he charge of receiving the marihuana in the United States, ot with having smuggled it in from Mexico; all other were ismissed by the trial Court.

C. THE EVIDENCE OF KNOWLEDGE OF THE PRESENCE OF THE MARIHUANA WAS SUFFICIENT AND APPELLANT'S CONVICTION SHOULD BE SUSTAINED.

This Court has stated in Evans v. United States, 57 F.2d 121 (9th Cir. 1958) at p. 128:

> "Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof."

In the case at bar, appellant approached the load ehicle, got in it, turned the lights on, and possibly turned he motor on [R.T. 151]. He was the lone occupant at the ime [R.T. 152]. Thus there is no question but that appelant had exclusive control and dominion over the vehicle and as exercising that dominion and control. The contraband as discovered in the vehicle momentarily thereafter [R.T. 53-154]. Thus, under the Evans test (supra) there are

potent circumstances tending to prove knowledge in this case.

Furthermore, the very statute under which appellant was charged, Title 21, United States Code, Section 176a, tends to indicate the sufficiency of the evidence in this case. That section provides in part as follows:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Under the Evans doctrine (supra) the trier of fact could certainly infer knowledgeable possession and if they did, under this section there was sufficient evidence to convict, particularly where, as here, the defendant gives no explanation whatsoever of his possession.

Appellant relies solely on Davis v. United States, 382 F.2d 221 (9th Cir. 1967) for his contention there was no showing of knowledge. Yet the Davis case is completely different than the case at bar. In Davis, the contraband was found later in a Sheriff's vehicle while here it was found immediately in the vehicle over which appellant was exercising sole and exclusive control. Davis was not found in possession of the contraband; here the appellant was. In Davis there not only had to be an inference of knowledge

but also of possession -- an inference upon an inference. Davis never had exclusive dominion and control of the car in which the contraband was found, but appellant here did.

And of course in this case we have other circumstances than just possession tending to indicate knowledge. We have the circumstances indicating appellant got out of the red Jaguar in which were found both Phillips and plain type screwdrivers. These were necessary to unload the marijuana from the panels where it was hidden [R.T. 158-159]. There was also a note pad and envelope in the Jaguar with notations as to a Phillips screwdriver and wrench for "pannels", 225 grass, K's, etc. [R.T. 156 and Government's Exhibits 3 and 6].

There is also the evidence showing the high value of the contraband [R.T. 197-198], which, of course, diminishes the likelihood of some innocent party having dominion and control thereof.

For all these reasons it seems clear there was sufficient evidence of knowledge and to convict, and certainly such is the case if the evidence is considered in the light most favorable to the government as is the rule on appeal.

D. THE SEARCH IN THIS CASE WAS LEGAL AND NOT VIOLATIVE OF THE FOURTH AND SIXTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

Appellant in his Argument IV seems to be rehashing the "revealing of informant" issue rather than the legality of the search. However, be that as it may, let's examine the legality of the search.

The record indicates that Agent Gates received a telephone call about twelve noon and was informed by a reliable informant, who gave thelicense number of a 1955 blue Oldsmobile, that the vehicle would be passing the border sometime after 4:00 p.m., and would probably be parked somewhere in the San Ysidro area and would have marihuana therein. He gave no information as to who might be driving the car [R.T. 114-116]. Agent Gates saw the vehicle come through the line and kept it under surveillance [R.T. 87-88]. It was parked in front of the San Ysidro Post Office, kept under surveillance, and no one put anything in the car [R.T. 89-92]. Later the appellant approached the Oldsmobile, got in and turned the lights on [R.T. 151]. The officers then approached the vehicle, searched it, discovered the marihuana and then placed the appellant under arrest [R.T. 153-154].

Even disregarding any question of so-called "Border Search," it is obvious just from a recitation of the facts that there was probable cause for the search of the automobile.

It was long ago held in Carroll v. United States, 267 U.S. 132 (1925), that law enforcement officers have the power to stop and search a vehicle if they have probable cause to believe that the vehicle is being used to transport contraband. And in Brinegar v. United States, 338 U.S. 160 (1949) the Supreme Court held that what the officer knew from outside reliable informants or from his own prior experience could be taken into account in deciding whether there was probable cause for the stopping and the search.

Certainly a reliable informant was involved here. Agent Gates testified he had obtained information from this individual about 12 times before and the information generally proved accurate [R.T. 115]. Furthermore, the facts later developed in this particular case, i.e., license number, make of car, place parked, and contraband proved to check with the informant's information relayed to Agent Gates and tended to show his reliability.

Also, it is a known fact, of which this Court can probably take judicial notice from its own experience, that the Tijuana, Mexico, San Ysidro, California, area is one of the most prevalent areas for smuggling in the world. Agent Jackson, who made the arrest, has been employed by Customs since 1951 and had been working marihuana cases since 1963 [R.T. 197], and certainly his and the other officers' prior experience,as well as Gates' prior experience with the informant should be taken into account pursuant to Brinegar

(supra) in deciding probable cause.

Assuming, arguendo, that probable cause for arrest or search was lacking, the search of the vehicle was a valid border search. As has been said by this Court previously, a search for contraband by Customs Officers away from the border "must be tested by a determination whether the totality of the surrounding circumstances . . . are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on a vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs Officials which meets this test is properly called a 'border search'."

Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966)

Since the vehicle here was constantly under surveillance by Customs Officers from the time it crossed the border until the moment that it was searched [R.T. 87-93, 149-151], the facts of this case clearly satisfy the test in Alexander.

As far as the statutory basis for such searches are concerned, the sections pertinent are Title 19, United States Code, Sections 482 and 1582. Section 482 reads as follows in pertinent part:

"Any of the officers . . . may stop, search, and examine . . . any vehicle,

beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States contrary to law." (19 U.S.C. 482, emphasis added.)

Section 1581 empowers the Secretary of the Treasury to promulgate regulations affecting searches of persons and baggage and the following regulation has been promulgated:

"(a) A Customs officer may stop any vehicle arriving in the United States from a foreign country for the purpose of examining the manifest or inspecting or searching the vehicle and may stop, search, and examine any vehicle or person within the limits of the United States on which or on whom he may have reasonable cause to believe there is merchandise subject to duty or which has been introduced into the United States contrary to law." (19 C.F.R., Sec. 23.1).

The constitutionality of Customs searches under these provisions have been sustained. Murgia v. United States, 283 F.2d 14 (9th Cir. 1960). The Court there held that there is no requirement of probable cause before

Customs agents can initiate a stopping and search.

Thus, it can be seen that whether we consider this search from the viewpoint of "probable cause" or "border search", it was legal and not violative of the defendant's constitutional rights.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22587

DANIEL SORANNO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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No. 22587

DANIEL SORANNO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Eastern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to be inducted into the Armed Forces of the United States), Universal Military Training and Service Act [TR 6].[1]

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [TR 7].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction [TR 2].

Appellant pleaded "not guilty" and was tried by the Honorable Thomas L. McBride, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [TR 6].

A written motion for judgment of acquittal was filed during the trial [TR 3 and RT 16, line 1].[2]

The appellant was found guilty [TR 4].

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1. TR refers to the Transcript of Record.
2. RT refers to the Reporter's Transcript.

FACTS

Appellant presented two sets of facts that require our consideration:

A.

Appellant was a student on September 20, 1964 when he wrote his local board requesting the Special Form for Conscientious Objector [Ex. 12].[3]

He timely filed said form on September 30, 1964 and was then "classified as a student until June '65" [Ex. 12] on October 26, 1964.

On October 15, 1965 he was classified as a conscientious objector, in Class I-O [Ex. 12].

On October 26, 1965 he wrote appealing the I-O classification pointing out that he was a full time student [Ex. 12].

On November 11, 1965 the board made an entry "Case reopened—Class I-A." [Ex. 12].

He took an appeal from this but the Appeal Board kept him in the same I-A classification [Ex. 13].

B.

Thereupon, he was ordered to report for induction but did not report [Ex. 13].

He gave as his reasons for not reporting that he had a fragile, artificial bridge to his nose, at that time awaiting further nose surgery and that he feared he would be "socked" on the nose at the induction station:

3. Ex. refers to Government's Exhibit.

1. "Q. Now, you wrote to the Local Board on a number of subjects and one of them is the condition of your nose, right?
   A. Yes.
   Q. On Pages 30, 40, 41, 57, and other references. I am going to read you portions of your letter that is on Pages 41 and 42 and ask if this gives the correct situation of the condition of your nose: 'On April 11, 1963, I underwent surgery on my nose to correct—' " [RT 43].

2. "THE WITNESS: Well, because I had read in the San Francisco Chronicle, as well as other sources, that people that do report sometimes are harassed or actually they can be socked by other inductees, or something, because of other reasons, in other words, it could be quite violent. I would try to avoid such places where I could get hurt obviously and fear was one of the things that really made me hesitate and really made me stop and wonder because I could get hurt down here just by going and saying to the officials that 'No, I am not going to go in the Army,' plus I have read of cases in the past where people that have reported—I am not sure whether it was Estop or one of those was, but they had reported down to the Induction Station and told the officials that they wouldn't allow themselves to be inducted and the official said, 'Well, you have already been inducted, you showed up,' and, therefore, they'd be tried in a military court instead of a civilian court and a military court, it seems to me, they don't listen to much reason concerning the conscientious objector's beliefs." [RT 75].

3. "Q. On November 25th, 1966, after you failed to report for induction as ordered, you wrote a letter to your Local Board asking them to give you another chance to report so that you could report this time and thereby exhaust your administrative remedy?
A. Yes, sir.
Q. Then you were given that other opportunity to report, this time in March of 1967, and you again failed to report?
A. Yes, sir.
Q. Again because you were afraid?
A. Yes, because I was afraid even more so at this time after reading the many reports.
Q. Why did you in November of 1966 ask your Board to give you another opportunity to report if you were afraid to report?
A. On that day I talked to or had the Attorney in Sacramento talk to the United States Attorney, Mr. Sloan, and for some reason he gave me a pep talk that I should show up, in other words, I was, you know, had just been filled out more or less." [RT 95].

Appellant's additional statements concerning the condition of his nose are found in the Exhibit, Pages 30, 40, 41 and 57.

QUESTIONS PRESENTED

I

Was a denial of a deferred classification to appellant, by the Selective Service System, without basis in fact, arbitrary and contrary to law? This was raised by the Motion for Judgment of Acquittal.

SPECIFICATION OF ERROR

I

The District Court erred in denying the Motion for Judgment of Acquittal.

SUMMARY OF ARGUMENT

I

Appellant made out a prima facie case as a conscientious objector. The task of the court is to search the record for some affirmative evidence to support the local board's denial of I-O classification to appellant. The record in this case is barren of any such evidence.

ARGUMENT

The Denial of a Conscientious Objector Classification by the Selective Service System Was Without Basis in Fact, Arbitrary, Capricious and Contrary to Law.

Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended [50 U.S.C. App. 456 (j)], provides:

> "Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . ."

Section 1622.14 (A) of the Selective Service Regulations [32 C.F.R. 1622.14 (A)] provides:

> "1622.14 Class I-O: Conscientious Objector Available for Civilian Work, Contributing to the Mainte-

nance of the National Health, Safety or Interest.—(A) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The local board's duties and the courts' scope of review in draft cases were spelled out by the United States Supreme Court in *Dickinson* v. *United States*, 74 S.Ct. 152, 157, 158, 346 U.S. 389 (1953):

> "The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."
>
> ". . . when the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson states the teachings even more explicitly (74 S.Ct. 152, 159):

> "Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

In the present instance appellant made out a prima facie case for a I-O classification when he asked for and then filed with the local board his Form 150 in which he claimed conscientious objection to war in any form based upon religious training and belief.

The government's case (the appellant's Selective Service file placed in evidence as the government's exhibit) is totally barren of any evidence whatsoever tending to cast the slightest doubt on appellant's sincerity or truthfulness, or that he hasn't presented a correct picture.

Thus the local board's denial of I-O classification to appellant and classifying him in Class I-A was without basis in fact and upholding that arbitrary classification would be contrary to the rule of law as set forth in *Dickinson.*

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. Tietz
Attorney for Appellant

May 10, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant

No. 22,587

IN THE

United States Court of Appeals

For the Ninth Circuit

DANIEL SORANNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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Subject Index

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No. 22,587

IN THE

United States Court of Appeals

For the Ninth Circuit

DANIEL SORANNO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

JURISDICTION

This a timely[1] appeal from a judgment of conviction in the United States District Court for the Eastern District of California for a violation of Title 50 U.S.C. App. § 462 (failure to report for induction).

Jurisdiction in the District Court was based upon Title 18 U.S.C. § 3231. Jurisdiction in this Court is conferred by Title 28 U.S.C. § 1291.

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[1]Judgment and sentence were entered on the record in this case on November 1, 1967. Notice of appeal was filed, pursuant to Rule 37(a)(2) F. R. Crim. P., on November 6, 1967.

STATEMENT OF THE CASE

Proceedings Below

By a one count indictment (Cr. No. S-175) filed on September 1, 1967, appellant was charged with a violation of Title 50 U.S.C. App. § 462 (failure to report for induction). On October 2, 1967 appellant entered a plea of not guilty and on October 30, 1967 a waiver of jury trial was filed and the appellant was tried before the Honorable Thomas J. MacBride sitting without a jury. Appellant was found guilty of the charge contained in the indictment on October 30, 1967 and on that date was sentenced to a term of imprisonment for three years.

Facts

The appellant initially registered for the draft on May 19, 1960, approximately 18 months after his eighteenth birthday.[2] On August 23, 1961 he was classified I-A.[3] After a pre-induction physical examination and on July 16, 1963, the appellant was found acceptable for military service.[4] On October 18, 1963 an order to report for induction was mailed to appellant to report on November 12, 1963.[5] Thereafter and on October 30, 1963 appellant's induction was postponed

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[2]Government Exhibit No. 1; the appellant's selective service file was admitted into evidence at the trial as Government Exhibit No. 1, although it appears to be denominated Government's No. 12 in appellant's Opening Brief. On page 4 of Government Exhibit No. 1 the appellant states his reasons for his late registration.

[3]Government Exhibit No. 1, p. 12.

[4]Government Exhibit No. 1, pp. 12 and 26.

[5]*Id.*, pp. 12 and 27.

and he was re-classified I-S(C) until June, 1964 because of his status as a full time student.[6]

On September 20, 1964 the appellant requested the selective service form for a conscientious objector (i.e., SS form 150).[7] On September 30, 1964 the local board received the completed SS form 150 and on October 28, 1964 classified the appellant II-S until June, 1965.[8] On September 15, 1965 the appellant was classified I-A and a notice of classification (SS form 110) was mailed to him on that date.[9] On September 16, 1965 the appellant wrote to his local board requesting a student deferment and another SS form 150 for conscientious objectors.[10]

The appellant was then re-classified I-O by his local board on October 15, 1965 and a notice of classification (SS form 110) was mailed on October 16, 1965.[11] On October 26, 1965 the appellant wrote to the board appealing his I-O classification.[12] Thereafter on November 10, 1965 the local board re-opened the appellant's case and classified him I-A and mailed a new notice of classification on November 12, 1965.[13] The appellant then wrote another appeal letter to his board on November 21, 1965.[14] The Selective Service file was for-

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[6]*Id.*, pp. 12, 28, 31, and 38; as to the I-S(C) classification see 32 CFR 1622.15(b).

[7]Government Exhibit No. 1, pp. 12 and 40.

[8]*Id.*, p. 12; see 32 CFR 1622.25.

[9]*Id.*, p. 12.

[10]*Id.*, p. 60, see also p. 62.

[11]Government Exhibit No. 1, p. 12.

[12]*Id.*, p. 63.

[13]*Id.*, pp. 12 and 13.

[14]*Id.*, p. 65.

warded to the appeal board on December 17, 1965[15] and on October 12, 1966 the Appeal Board for the Northern District of California, after an investigation and recommendation by the Department of Justice, unanimously classified the appellant I-A.[16]

After being classified by the Appeal Board I-A and on October 18, 1966 the appellant was ordered to report for induction on November 3, 1966.[17] On October 22, 1966 the appellant wrote to the local board requesting, in effect, that he not be inducted.[18] The local board advised the appellant by letter dated October 26, 1966 that his classification was not re-opened and to report for induction as ordered.[19]

On October 31, 1966 the appellant's file was forwarded to State Headquarters of the Selective Service System and reviewed by that office.[20] The registrant failed to report for induction as ordered on November 3, 1966[21] and on November 15, 1966 wrote to the local board requesting another opportunity to report so that he might exhaust his administrative remedies.[22]

The appellant was then afforded another opportunity to report for induction under the original induction order by letter of February 3, 1967 ordering him

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[15]*Id.*, pp. 13 and 67.
[16]*Id.*, pp. 13, 72-81, and 101.
[17]*Id.*, pp. 13 and 103.
[18]*Id.*, pp. 105-106.
[19]Government Exhibit No. 1, p. 112.
[20]*Id.*, pp. 13, 113, 118-120.
[21]*Id.*, p. 13.
[22]*Id.*, pp. 115-116.

to report for induction on February 9, 1967.[23] On February 8, 1967, the appellant requested and was granted a transfer for induction to a local board in Sacramento, California with a reporting date of March 8, 1967.[24] On the latter date, i.e., March 8, 1967, the appellant failed to report for induction.[25] The reasons for not reporting are spelled out by the appellant on pages 74-75, 82, 85-86, and 94-95 of the Reporter's Transcript.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE APPELLANT DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES.

A. Nowhere in appellant's argument does he mention the fact that he did not report to the local board or the induction station on March 8, 1967, the day he was ordered to report for induction. The threshold question therefore is whether the appellant can raise the defense of no basis in fact to his classification when he did not go to the brink of induction. The appellee respectfully submits that the propriety of the classification in this case is not open to attack. *Estep v. United States,* 327 U.S. 114 (1946); *Billings v. Truesdell,* 321 U.S. 542 (1944); *Daniels v. United States,* 372 F.2d 407 (9th Cir. 1967) at page 413, footnote 8; and *Williams v. United States,* 203 F.2d 85 (9th Cir. 1953), *cert. denied,* 345 U.S. 1003 (1953).

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[23] *Id.*, p. 130.

[24] *Id.*, pp. 13 and 133.

[25] *Id.*, p. 13, and Reporter's Transcript, p. 15.

At the trial of this case the appellant sought to avoid the exhaustion rule by asserting that he had an "excuse" for not reporting for induction.[26] He apparently abandons that position on appeal. However, the appellee respectfully submits that this is a singularly inappropriate case to disregard the fact that the appellant did not go to the brink of induction. First of all, the local board afforded the appellant an opportunity to report a second time after the receipt of his letter dated November 15, 1966 (Government Exhibit No. 1, pp. 115-116) wherein the appellant specifically requested to be ordered to report again so that he could appear at the induction station and thereby "get a judicial review in the courts to the fullest." He nevertheless failed to report on March 8, 1967.

Additionally, it is difficult to conceive as a valid excuse for not reporting the bare fact that the appellant was afraid to so report. It is submitted that this is not a proper ground for the relaxation of the exhaustion doctrine. Cf. *Donato v. United States,* 302 F.2d 468 (9th Cir. 1962).

B. Notwithstanding the above, the appellee respectfully invites the Court's attention to the Resume of the Inquiry contained on page 76 of Government Exhibit No. 1 and the recommendation of the Department of Justice on page 72 of Government Exhibit No. 1, both of which provide a basis in fact for the Appeal Board's classification of appellant. Cf. *Lingo v. United States,* 384 F.2d 724 (9th Cir. 1967); *Sal-*

[26]Reporter's Transcript, pp. 70-72.

amy v. United States, 379 F.2d 838 (10th Cir. 1967); and *Keefer v. United States,* 313 F.2d 773 (9th Cir. 1963).

CONCLUSION

For the foregoing reasons the District Court did not err in denying the motion for judgment of acquittal in this case and the judgment of conviction heretofore entered by the District Court should be affirmed.

Respectfully submitted,

JOHN P. HYLAND
United States Attorney

By JAMES J. SIMONELLI
Assistant United States Attorney

Attorneys for Appellee
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES J. SIMONELLI
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 22588

Appeal from the United States District Court
for the Southern District of California
Honorable Fred Kunzel, District Judge

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX
(Rule 18-2(a))

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ, No. 22588

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the Southern District of California

Honorable Fred Kunzel, District Judge

APPELLANT'S OPENING BRIEF

JURISDICTION
(Rule 18-2(b))

Appellant was indicted in the United States District Court for the Southern District of California in a four count indictment. Count One charged that he knowingly imported approximately one ounce of heroin in violation of United States Code, Title 21, Section 174. Count Two charged that he knowingly concealed and facilitated the transportation and concealment of the heroin. Count Three charged that he smuggled approximately seventy pounds of marijuana into the United States in violation of United States Code, Title 21, Section 176(a). Count Four charged that he knowingly concealed and facilitated the transportation and concealment of the marijuana. (R. 2-5). He was found

guilty by a jury on all four counts and committed to the custody of the Attorney General for imprisonment for a period of seven years on each count to run concurrently. (R. 21, 24). The District Court had jurisdiction under United States Code, Title 18, Section 3231. This Court has jurisdiction to review the judgment of conviction under United States Code, Title 28, Section 1291.

STATEMENT OF THE CASE
(Rule 18-2(c))

As heretofore set forth, appellant was charged in a four count indictment with smuggling, concealing, and facilitating the transportation and concealment of approximately one ounce of heroin and seventy pounds of marijuana in violation of United States Code, Title 21, Sections 174 and 176(a). (R. 2-5). He pleaded not guilty and was tried before a jury. (R. 10, 19-20). His motion for judgment of acquittal made at the conclusion of the Government's case was denied. (R. 19, R.T. 35). The jury returned verdicts of guilty as to all four counts. (R. 21). The court adjudged that the defendant be committed to the custody of the Attorney General for imprisonment for seven years on each count, to run concurrently. (R. 24).

Evidence

On February 15, 1967, appellant, Jose Malagon-Ramirez, entered the United States by automobile from Mexico through the Port of Entry at San Ysidro, California. (R.T. 4). Customs Inspector Charles Trumble became suspicious because the arm rests were missing from the car and a rear window would not roll down. He removed appellant from the vehicle, took him to the Customs office, where he seated him in a chair, returned, searched the vehicle, and discovered about seventy pounds of marijuana concealed behind a panel in the rear of the vehicle. (R.T. 5-6, 14-15, 17).

The vehicle was subsequently impounded in the customs impound lot. About a month later marijuana debris was noticed under the car, and further search of the vehicle disclosed another approximately seventy pounds of marijuana concealed in a special compartment built under the trunk. (R.T. 17-19).

When Inspector Trumble took appellant to the Customs Office, he left him seated in a chair approximately one and one-half to two feet from the desk where the customs inspector working in the office sits. (R.T. 6). Customs Inspector Lee Price was sitting in front of the desk. (R.T 32-33). The chair was the only one in the vicinity, and no other people were sitting near by. (R.T. 6). A great number of people go in and out of the office. It is quite likely that someone else had sat on the chair previously. The Inspector was not concerned with who had sat on the chair. (R.T. 11).

Inspector Trumble then took the appellant to a search room where he made a personal search. (R.T. 6, 12). As they got to the search room appellant for the first time began to appear nervous. (R.T. 12). The search revealed nothing, and appellant was taken to a holding cell. (R.T. 6, 13).

When Inspector Trumble returned to the office, he noticed a rubber contraceptive lying on the floor between the chair where appellant had been sitting and the desk,

about six inches from the chair and a foot to fourteen inches from the desk. (R.T. 7, 13). The contraceptive contained heroin. (R.T. 7, 15-16). Customs Inspector Lee Price did not testify. (R.T. 1).

Appellant was interviewed by a Customs Port Investigator. (R.T. 20). Appellant denied any knowledge of the marijuana or the heroin. (R.T. 23). He stated that he was making a trip to the United States with a Mr. Padilla to look for a stove, as he had done on a previous occasion. Mr. Padilla suggested that he drive the automobile across the border, while Padilla went to the bus station near by to seek riders to help defray the expense of the trip. (R. T. 21-23). When asked about ownership of the vehicle, appellant referred the investigator to the registration certificate. (R.T. 26). From the information given by appellant customs officials were able to locate neither appellant's wife nor Mr. Padilla. (R.T. 23-25). Neither could they find the person to whom the automobile was registered. (R.T. 25). Appellant appeared to the investigator to be consistent in his answers and not to be nervous. He was very cooperative. (R.T. 27).

Questions Involved

1. Was the circumstantial evidence of appellant's possession of the heroin found under the chair adequately sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt?

2. Was appellant deprived of the benefit of the presumption of innocence by instructions that, "there is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from the way in which all reasonable persons treat any question depending upon evidence presented th them", and that, "if the accused is guilty, say so; if not, say so."? (R.T. 83)

SPECIFICATION OF ERRORS
(Rule 18-2(d))

1. Appellant's contention regarding the insufficiency of the circumstantial evidence as to the possession of the heroin is predicated upon the erroneous denial of appellant's motion for acquittal made at the conclusion of the Government's case. (R. 19, R.T. 35). The proceedings were as follows:

> "MR. GILLIS; I am not sure of the correct Federal procedure, but I would like to make a motion for dismissal on the second charge of transporting the heroin. I don't feel that the Government has sustained the burden.
>
> "THE COURT: You mean a judgment for acquittal. You don't have the form after five years.
>
> "The motion will be denied."

(R.T. 35).

2. Appellant contends that the trial court erred in its charge to the jury on the subject of reasonable doubt. The instructions as to the definition of reasonable doubt were as follows:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved and in case of a

reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. The effect of this presumption is to place upon the Government the burden of proving him guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows. It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (R.T. 75-76).

* * * * * *

"There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from the way in which all reasonable persons treat any question depending upon evidence presented to them.

"You are expected to use good common sense. Consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings. If this accused is guilty, say so; if not, say so." (R.T. 83).

Trial counsel made no objection to the instructions as given. (R.T. 85).

ARGUMENT
(Rule 18-2(e))

Summary

The circumstantial evidence of appellant's guilt of the heroin charges was insufficient to support the conviction, in that it failed to exclude the reasonable hypothesis that the heroin was left on the floor of the Customs Office by someone other than appellant. No evidence whatever was introduced to exclude the possibility that the heroin was already on the floor when appellant was brought to the office, or that it was left there by someone else, while appellant was being searched. The government failed to produce as a witness the customs inspector who its evidence indicated was in the office at the times in question. The error in denying appellant's motion for acquittal on the heroin counts prejudiced him as to all four charges, because the jury's erroneous determination that the evidence supported the conclusion that he had left the heroin in the Customs Office necessarily influenced their further determination that he knew that the marijuana was in the automobile.

The trial court's initial instructions as to the definition of reasonable doubt were legally sufficient, but adequate instructions are difficult to frame and even adequate instructions are difficult for juries to understand. The concluding remarks of the court on the subject

were much easier to understand, but they conveyed the impression that the jury may apply the same standard to determination of guilt as it would in determining, e.g., whether to buy a particular stock. By limiting the jury to the choice between guilt and innocence, the court distracted their attention from the Scotch verdict, "not proven", and invited resort to the standard of the preponderance of the evidence. Trial counsel made no objection to the form of the instructions, so the question must be reviewed as plain error. (R.T. 85).

I

THE CIRCUMSTANTIAL EVIDENCE AS TO THE HEROIN CHARGES DOES NOT SUPPORT APPELLANT'S CONVICTION, BECAUSE IT IS INSUFFICIENT TO ENABLE A REASONABLE DETERMINATION THAT IT EXCLUDES THE HYPOTHESIS THAT SOMEONE OTHER THAN APPELLANT LEFT THE HEROIN IN THE CUSTOMS OFFICE BEFORE APPELLANT ARRIVED OR WHILE HE WAS BEING SEARCHED.

In DAVIS vs. UNITED STATES, 9th Cir. 1967, 382 F.2d 221, the day after the defendant had been transported in a sheriff's vehicle, heroin was found in the seat where she had been sitting. The evidence was held insufficient to support her conviction of having knowingly concealed and facilitated the transportation and concealment of the heroin Although the deputy sheriff had examined the automobile before the defendant was transported, and he testified in detail as to its use from the time the defendant was transported until the heroin was found, the evidence did not totally exclude the possibility that the heroin had come into the vehicle before or after the defendant was transported.

The case at bar is squarely governed by the reasoning in DAVIS. There are, of course, factual differences. The difference faborable to the government is that the time interval between the presence of the defendant and the discovery of the heroin was shorter in DAVIS than it was here. Other differences tend to favor appellant. Here the Customs Office was open to the public, including members thereof who

might be motivated to jetison contraband, whereas in DAVIS the sheriff's vehicle was not. In DAVIS the place in which the contraband was found had been examined before Davis was brought to it. Here, Inspector Trumble testified that he had no concern with who might have used the chair before. (R.T. 11). In DAVIS the custodian of the place in which the heroin was found testified in detail as to events during the times at which the heroin could have been placed there. Here, Inspector Lee Price, who worked at a desk located less than two feet from the place where the heroin was found, was not called to testify as to what opportunities, if any, there were for others to have left the heroin where it was found. In the light of these circumstances, appellant submits that the evidence excluding the possibility of innocence is much weaker here than it was in DAVIS, and that the conviction must therefore be reversed.

The failure to grant appellant's motion for acquittal as to the heroin count was prejudicial as to all four counts. Appellant's defense on the marijuana charges was that he did not know that the marijuana was in the vehicle. If the jury believed that he had dropped some heroin in the Customs Office, it was of course exceedingly unlikely that they would believe that he did not know that the marijuana was in the automobile. Since the jury did erroneously conclude that appellant dropped the heroin, as is evidenced by their verdicts on the heroin charges, they

must have been prejudiced as to the marijuana counts. Therefore, the judgment must be reversed as to all four counts.

II

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS ON REASONABLE DOUBT, BECAUSE THE LIMITATION TO A CHOICE BETWEEN GUILT AND INNOCENCE OMITS THE AREA IN WHICH GUILT IS PROBABLE, BUT REASONABLE DOUBT HAS NOT BEEN ELIMINATED, AND BECAUSE IT IS NOT TRUE THAT APPLICATION OF THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT IS THE WAY IN WHICH ALL REASONABLE PERSONS TREAT ANY QUESTION DEPENDING ON EVIDENCE PRESENTED TO THEM.

In HOLLAND vs. UNITED STATES, 348 U.S. 121, at 140, 99 L.ed. 150, 75 S.Ct. 127, the Supreme Court said:

> "Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to reasonable doubt. He defined it as 'the kind of doubt. . .which you folks in the more serious and important affairs of your own lives might be willing to act upon.' We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see (citation), rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury

into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. 'Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury' (citation), and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury."

The charge of the trial court in the case at bar on reasonable doubt is set forth above at pages 7 to 9. Appellant submits that it is more prejudicial than that in HOLLAND. The HOLLAND charge referred to acting upon a doubt, a concept likely to be confusing, but therefore unlikely to induce the jury to act in the case in an improper manner. Here the trial court clearly told the jury that they might find the defendant guilty, if they were as satisfied of his guilt as they would be with regard to any question depending upon evidence presented to them. Thus, a juror was authorized to find the defendant guilty, if he was as satisfied of guilt as he was that the price of the stock in which he had invested the week before was going to

go up rather than down. Such an instruction is not confusing. It is just prejudicially wrong.

The second error in the instructions was in giving the jury the choice of guilt or innocence. There are, of course, three possibilities in a criminal case. (1) The jury is convinced of guilt beyond a reasonable doubt. (2) The jury is convinced of innocence. (3) The jury thinks that the defendant is guilty, but there remains a reasonable doubt, i.e., the Scotch verdict -- "not proven". The court's charge distracted the jury's attention from this third vital possibility, which was omitted by inviting the jury to say whether the defendant is guilty or innocent, and which reasonable persons frequently do not consider, when deciding questions depending upon evidence presented to them.

Appellant of course recognizes that the HOLLAND case ended in affirmance rather than reversal. As we have said, the error here was far more prejudicial than that in HOLLAND. Moreover, the case at bar was tried long after the Supreme Court had announced its decision in HOLLAND. This, we submit, is a factor to be considered in determining the proper disposition of a case involving a more aggravated form of the same type of error.

CONCLUSION

The trial court erred in denying appellant's motion for acquittal as to the heroin charges, because the circumstantial evidence was insufficient to exclude innocence. This error was prejudicial as to the marijuana charges as well. The trial court also erred in its explanation of reasonable doubt to the jury. For these reasons, the judgment should be reversed.

Respectfully submitted,

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By_____
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CERTIFICATE
(Rule 18-2(g))

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Perry Langford